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No. _____

In The Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993), the court of appeals properly held that all actions brought under the False Claims Act are subject to Rule 9(b), when the False Claims Act expressly provides that intent to defraud need not be proven and imposes liability in circumstances that do not constitute fraud.

2. Whether the court of appeals' restrictive interpretation of Rule 9(b) imposes an excessive burden on *qui tam* relators that is inconsistent with the language and purposes of the Rule and is contrary to Congress's expressed intent to encourage whistleblowers with knowledge of wrongdoing to come forward.

3. Whether the court of appeals erred in refusing to accept the allegations of the complaint as true, requiring the pleading of evidence, and refusing to allow amendment to conform to its new, heightened pleading standard.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Jeffrey Scott Clausen respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at 290 F.3d 1301. App. at 1-36.[1] The Order denying rehearing is unreported. App. at 37-38.

JURISDICTION

This Court has jurisdiction to consider this case by way of a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 9(b) provides in pertinent part: "Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[1] "App." refers to the separately bound Appendix to the Petition for a Writ of Certiorari.

Pertinent provisions of the False Claims Act, 31 U.S.C. § 3729-3733, are set forth at App. at 39-50.

STATEMENT OF THE CASE

I. Course of proceedings and disposition below

Relator Jeffrey Scott Clausen filed his original *qui tam* complaint under seal on July 28, 1997, alleging that Defendant Laboratory Corporation of America, Inc. ("LabCorp") violated the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA") by knowingly submitting false claims for payment to the United States. After the United States elected not to intervene, Relator filed an Amended Complaint on May 10, 2000. On November 29, 2000, the district court granted LabCorp's motion to dismiss the Amended Complaint pursuant to Rule 9(b). Relator filed his Second Amended Complaint ("SAC") on December 29, 2000. On May 16, 2001, the district court dismissed the SAC with prejudice under Rule 12(b)(6) because, while all other elements of an FCA cause of action were pled with sufficient specificity, the exact dates of the claims submitted to the government were not provided. Relator filed his notice of appeal on June 13, 2001.

On May 9, 2002, a divided panel of the Eleventh Circuit Court of Appeals affirmed the district court's dismissal. In so doing, the majority erroneously held that Rule 9(b) applied to actions brought under the FCA, and created and applied a new ultra-heightened pleading standard that ignores this Court's precedents and ultimately requires relators to prove their case at the time of pleading. The majority held that every element of an FCA cause of action must be pled with exactness to protect defendants from frivolous lawsuits. App. at 26 n.23, 27 n.24. Although the SAC identified the exact dates of hundreds of improper medical tests, and expressly alleged

that bills were submitted to the government on the date of the test or a few days thereafter, the majority concluded that these allegations were not specific enough under Rule 9(b) because Relator did not provide a sufficient "factual basis" for the express allegation that claims were submitted to the government. *See id.* at 27 ("But we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.").

The dissent correctly noted that the majority focused on the credibility of Relator's allegations rather than their particularity. *Id.* at 34-36. The dissent pointed out that "the majority asks for proof, and proof is not required at the pleading stage." *Id.* at 35. The dissent found the allegations of claim submission to have been pled with sufficient particularity. *Id.* at 32-33. The dissent concluded: "My concern with the law the Court makes today is that it is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation." *Id.* at 36. On June 30, 2002 Relator filed a Petition for Rehearing En Banc. On July 5, 2002, the Eleventh Circuit Court of Appeals issued its Order denying the petition. *Id.* at 37-38.

II. Statement of facts

Relator's Second Amended Complaint alleges that LabCorp systematically violated the FCA, submitting false claims by billing Medicare for unnecessary, unauthorized, or duplicative lab tests. Relator, who learned of LabCorp's fraudulent practices while seeking to compete with LabCorp in the market for laboratory services, and through contacts with his LabCorp counterparts, did not merely describe LabCorp's fraud schemes. Relator explained how the false claims were submitted, and identified – by patient, date, location, and test – literally hundreds of

specific examples of false billings. He alleged that claims for payment were submitted on form HCFA 1500, and attached a copy of that form to the complaint. He showed the exact section of the form where the false information was documented, identified the billing codes that were used and alleged that LabCorp billed the government for the tests on the date of service or within a few days thereafter.

Relator's Second Amended Complaint and its exhibits identified some 230 specific examples of false claims. Paragraph 38 provided detailed allegations of a particular false claim, giving the patient initials, the room number, dates of service, an explanation of the fraud, and the CPT codes under which LabCorp submitted the claim. Paragraph 60 provided detailed allegations regarding two patients at a nursing home in Social Circle, Georgia, stating the patient initials, the dates of service, and a description of the conduct complete with CPT codes for the services at issue. In each of these instances, the complaint alleged that the claim for payment was submitted to the government on the date of service or within a few days thereafter.

The exhibits to Relator's Second Amended Complaint identified hundreds more false claims. Exhibit C provided details regarding LabCorp's testing and billing for 79 patients at the A.G. Rhodes Home. Exhibits D and I provided similar details regarding LabCorp's testing and billing for 56 patients at Social Circle Nursing Home and 95 patients at Hospitality Care Nursing Home.

As Judge Barkett noted in her dissenting opinion, "the district court deemed Clausen's complaint to have complied with the particularity requirements of Rule 9(b) at least insofar as it described the various arrangements or 'schemes' by which LabCorp would allegedly perform medically unnecessary tests. Moreover, the complaint

identified specific patients and specific dates on which those tests were performed." App. at 31.

REASONS FOR GRANTING THE PETITION

There are four reasons to grant this petition for certiorari. First, a divided court of appeals decision in this case continues a national trend of cases that completely undermine the False Claims Act, the number one tool for defending the public fisc against unscrupulous contractors, by creating new, pre-discovery, pleading standards under Rule 9(b) that few, if any, potential whistleblowers will be able to meet. Without this Court's protection from impossible pre-discovery pleading requirements, potential whistleblowers will retreat to the very "conspiracy of silence" that Congress attempted to pierce by amending the False Claims Act in 1986.

Second, a requirement that complaints particularize with exactness every single element of an FCA cause of action violates fundamental principles under the Federal Rules established by this Court's longstanding precedents, as well as completely ignoring Rule 8.

Third, the national trend of courts of appeals' decisions misapplying Rule 9(b) to a statutory cause of action that is expressly *not* a fraud statute directly contravenes this Court's precedents establishing that any expansion of Rule 9(b) must be undertaken by Congress and not by federal courts. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 999, 152 L.Ed.2d 1 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993). The failure of the court in this case, and others, to even acknowledge this Court's precedents demonstrates the need for review by this Court.

Fourth, the court of appeals' decision continues a trend of federal courts directly contravening this Court's precedents that technicalities should not trump the mandate to determine matters on the merits. Courts should be reminded that there is no requirement of proof at the pleading stage, that on a motion to dismiss the court must take all allegations as true and draw all inferences in the light most favorable to the nonmovant, and that amendments are to be liberally granted.

I. The *Clausen* court's decision directly countermands Congress's intent in the 1986 amendments. It will drive whistleblowers underground and effectively gut the False Claims Act.

"[T]he FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Vt. Agency of Natural Res. v. Stevens,* 529 U.S. 765, 781, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quoted citation omitted). However, restrictive court interpretations undermined the effectiveness of the FCA. S. Rep. No. 99-345, 99th Cong., 2d Sess. 1, 4, reprinted in 1986 U.S.C.C.A.N. 5266, 5269 (hereinafter referred to as "S. Rep."). These restrictive interpretations drove away potential whistleblowers and prevented the effective use of the number one tool for "defending the Federal treasury against unscrupulous contractors and grantees." S. Rep. at 4-5. Congress recognized the essential role of whistleblowers in the FCA and the "great unwillingness to expose illegalities." *Id.* at 4.

In analyzing this problem, Congress recognized that the two primary reasons potential whistleblowers were reluctant to come forward were "the belief that nothing would be done to correct the activity even if reported" and "fear of reprisals". *Id.* at 5. In 1986, Congress amended the

FCA to "correct[] restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions" and to "encourage more private enforcement suits." *Id.* at 4, 23-24. Congress also added an anti-retaliation provision. *Id.* at 34-35.

Congress's trust in a liberalized FCA freed from restrictive court rulings was very effective. Since the 1986 amendments, the taxpayers have recovered over 5 billion dollars under the *qui tam* provisions of the FCA. U.S. Department of Justice, *Qui Tam* Statistics: October 1, 1986-September 20, 2001 (2002). The FCA has been hailed as an important piece of legislation. *See e.g., Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 538, 544 (10th Cir. 2000). It has been recognized as the most important tool for recovery of government losses. *See e.g., AVCO Corp. v. U.S. Dept. of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989).

Rather than follow the clear intent of Congress, the court of appeals extended Rule 9(b) to FCA cases even though it acknowledged that "'[t]his requirement makes it hard for many persons to bring a *qui tam* suit. . . .'" App. at 15 (quoting *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994)). Instead of embracing Congress's belief that encouragement of whistleblowers is essential to protecting the public fisc, the court of appeals treated the FCA as essentially a litigation lottery for parties who seek a "windfall" and who are not the "real" victims. App. at 27 n.24. The implication was that if the government did not deign to intervene, the case must be meritless and should be dismissed under Rule 9(b). *See* App. at 14 (noting the government's declination). With these guiding principles, the court of appeals created an exacting and onerous heightened pleading standard under Rule 9(b), not only requiring that every aspect of a prima facie FCA cause of action be pled with excruciating particularity (including the exact date and amount of false claims submitted), but also requiring that particularized allegations contain

sufficient "indicia of reliability". *Id.* at 22, 26 n.23. In direct contravention of this Court's precedents, the court of appeals has made FCA cases "a game of skill in which one misstep by counsel may be decisive to the outcome," and has rejected "the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). With this incredibly exacting misinterpretation of Rule 9(b) as applied to FCA cases, the Eleventh Circuit has effectively resurrected the restrictive court interpretations the 1986 amendments were intended to overcome, pushed potential whistleblowers back into the shadows and put the shackles of ineffectiveness back on the FCA for good.

Under the Eleventh Circuit's holding, whistleblowers will rarely, if ever, get to the merits of their claims. As whistleblowers across the nation see the pre-discovery bar raised and reformulate the "belief that nothing [will] be done to correct the [false claims] activity" and that they will be unlikely to even get to the merits of the matter, they will quickly retreat to the shadows of silence. *See* S. Rep. at 5. Potential whistleblowers are keenly aware that without discovery, few, if any of them, would be able to meet the unnecessary and excessive requirements added by the court of appeals. Unlike typical fraud cases, where the plaintiff is the defrauded party and is thus knowledgeable of each of the elements of the cause of action, whistleblowers filing *qui tam* cases are not the primary victims of the defendant's acts, nor are they the parties to whom the false statement was made. Rather, they are representatives suing on behalf of the United States. Especially where the defendant is a large corporation, such whistleblowers will likely know only those parts of a defendant's conduct to which they have been privy. For example, a salesman, service provider, or manufacturer may know the nature of the defendant's

scheme, but will not know all of the particular details as to how that scheme is effected. On the other hand, billing clerks and accountants may know the details of the invoices, but not why they are incorrect. Seldom, if ever, will one whistleblower know the exact dates on which each false claim has been submitted to the government, as well as all the details of the scheme that make the claims false.

It takes no great powers of divination to recognize that the likelihood of a potential whistleblower having a hand on "both ends of the elephant" – the head, where fraudulent schemes are conceived and implemented, and the tail, where bills are sent out and funds are received – is effectively nil. Nevertheless, under the new rule, whistleblowers are required to describe every detail of the elephant or have their case dismissed with prejudice before ever accessing basic discovery. Even the quintessential insider/whistleblower, such as a defense contractor employee who knows that tanks, planes or weapons sold to the government are defective, would not know the exact date and amount of each claim submitted. The Eleventh Circuit has turned a procedural device, designed to make sure that a defendant knows what it is up against, into a substantive limitation preventing whistleblowers from bringing claims unless they can, by memory and without discovery, trace the fraudulent conduct all the way to the defendant's bank deposits. This holding, in the context of a case where the factual allegations are as detailed as those here, is irreconcilable with the intent of the FCA.

Similarly, Congress's purpose is obviously defeated where an employer can foreclose a *qui tam* action by either ensuring that employees' access to information is compartmentalized, or by firing a curious or complaining employee before he has had the chance to obtain enough detail to satisfy the sort of heightened Rule 9(b) standard imposed by the appellate court here. In fact, since a defendant's potential liability for the submission of false

claims is far greater than its potential liability to a single employee for improper discharge, employers would be given an incentive to terminate employees sooner rather than later.[2] Indeed, such a termination will serve to keep the employee from "put[ting] all the pieces of the puzzle together," especially because evidence of submission of false claims "is the kind of information a plaintiff normally cannot acquire until he files a suit and obtains the benefits of court-sanctioned discovery." *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998).

Given the basic practicalities of the situations in which potential whistleblowers very often find themselves, the appeals court's decision stands not as an aid to a defendant's ability to defend itself, but as a brick wall between the whistleblower and exposure of fraud. Congress's purpose is directly thwarted by the *Clausen* court's wooden Rule 9(b) analysis.

II. The new heightened pleading standard is contrary to the plain language of Rule 9(b), conflicts with this Court's precedents and eliminates Rule 8's notice standard.

The *Clausen* opinion conflicts with this Court's clear direction that creating heightened pleading standards is a legislative and not a judicial function. See discussion below; *see also Swierkiewicz, supra*, 122 S.Ct. at 999; *Leatherman, supra*, at 164. In addition, by creating

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[2] Moreover, even the retaliation claims will be diminished because many circuit courts require that an FCA case be "a distinct possibility" at the time assistance is rendered. *See Childree v. UAP/GA AG Chem.*, 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994).

"heightened pleading" requirements for the purpose of weeding out "meritless" claims before the parties engage in "unnecessary" discovery, courts such as *Clausen* subvert the bedrock principle of the Federal Rules that the purpose of pleadings is to put parties on notice – not to establish the merits. Indeed, the *Clausen* court made it clear that the particularity it demanded in this case was not even intended to provide information to the defendant, but rather to weed out, pre-discovery, a case it believed had no merit.

The court of appeals in this case appears to have conceded that the allegations of fraud were pled with sufficient particularity to put the defendant on notice under Rule 9(b), but felt the allegations somehow not sufficient to protect the defendant from "frivolous suits". *Compare* App. at 31 ("The majority appears to accept that the first purpose of Rule 9(b) – alerting defendants to the precise misconduct with which they are charged – would not be frustrated were Clausen's complaint permitted to survive.") *with* 27 n.24 ("We believe Clausen's failure to plead all the elements of his claim with specificity violates an equally strong purpose of Rule 9(b) – protecting defendants from frivolous suits. . . ."). This directly contravenes the prime directive of the Federal Rules and this Court's precedents. "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.'" *Swierkiewicz, supra,* at 999 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). "This simplified notice pleading standard relies on *liberal discovery rules* and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, at 998 (emphasis added).

While Rule 9(b) allows courts to swing the pendulum of pleading requirements away from pure notice pleadings,

in order to preserve these fundamental concepts, Rule 9(b) is always to be read in conjunction with Rule 8. "Rule 9(b) challenges must be gauged in light of the purposes the rule is designed to fulfill and not simply by an abstract fastidiousness." *United States v. Gericare Med. Supply, Inc.*, 2000 U.S. Dist. LEXIS 19661 at *15 (S.D. Ala., Dec. 11, 2000). "Rule 9(b) neither serves as a throwback to the hyper technical pleading requirements of the Field Code nor requires needless repetitive pleading." *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 273 (N.D. Tex. 1990). Rather, it must be considered in tandem with Rule 8. "The application of [Rule 9(b)] must not abrogate the concept of notice pleading." *Durham v. Business Management Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (citing *Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985)). Rule 9(b) requires only that the complaint sufficiently identify the circumstances of the challenged conduct to place the defendants on notice of the plaintiffs' claims so they can defend. *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988).

The *Clausen* court has swung the pendulum of pre-discovery pleading so far in the direction of heightened pleadings, it has destroyed Rule 8 and the prime directive of the Federal Rules. Under the new standard, the *Clausen* court requires that every aspect of a prima facie FCA cause of action be pled not only with particularity, but also with "some indicia of reliability" of the allegations. App. at 22. The court focused on the exact date and amount of false claims submitted to the government. *Id.* at 24. The court even suggested that the failure to specifically identify the employee of the company who submitted the false claims could be grounds for dismissal. *Id.* at 23 n.20. The requirement that every element of a claim be pled with specificity leaves nothing to be pled with "a short plain statement" and shifts the focus of pleadings from notice pleading to technical traps for the unwary. This new

requirement completely subverts and supplants the purposes of the Federal Rules and especially Rule 8. Making determinations of merits based on hyper-technical pleadings is precisely the "game of skill" this Court in *Conley* was trying to avoid. *Conley, supra*, at 48.

The requirement that each element of the claim be pled with specificity is also contrary to the plain meaning of Rule 9(b). Rule 9(b) states that "[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." Thus, by virtue of its very language, the rule applies only to "averments of fraud," and as to those "averments," only the "circumstances constituting fraud" need be stated with particularity. Rule 9(b) thus does not require that a *prima facie case* be stated with particularity – it only requires particularity with respect to those circumstances that constitute *fraud*. *See* 2 MOORE'S FEDERAL PRACTICE, 3d ed., § 9App.01 (1998) ("Rule 9 does not require certain averments of facts constituting a *cause of action*. . . . Rather, the provisions simply require more specificity for *certain averments*, including . . . the circumstances constituting fraud." (emphasis added)). *See also Swierkiewicz, supra*, at 999 (no prima facie case need be pled).

A "circumstance" is "An accompanying or accessory fact, event, or condition, such as a piece of evidence that indicates the probability of an event." BLACK'S LAW DICTIONARY 236 (7th ed. 1999). Therefore, "circumstances of fraud" are those facts or events that make the fraud more probable. Filing a claim is an element of an FCA cause of action, but the "circumstances of fraud" are what make it actionable.

In the present case, the "circumstances" constituting the fraud are those aspects which render the claim false or fraudulent, which the district court acknowledged were pled with sufficient specificity – i.e., the performance of

tests that were unnecessary, duplicative, or otherwise improper. The ministerial act of actually *submitting* a HCFA 1500 claim form to the government may be necessary to give rise to a claim under the False Claims Act, but the "circumstances constituting fraud" are those circumstances that make the claim false. The reasons why a claim is false are not necessarily apparent from the face of the claim form; indeed, it is likely that the billing clerk who actually transmits the form to the government has no knowledge of the underlying facts that make the claim false. Accordingly, it makes little sense to require that the circumstances regarding the *submission* of the claim be pled with exacting specificity, since those circumstances do not go to the heart of the fraud.

The *Clausen* court's raising of the bar so high under Rule 9(b) that meritorious claims will be dismissed demonstrates that now the technicalities of pleadings will be more important than the actual merits. As the dissent stated, "My concern with the law the Court makes today is that it is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation." App. at 36. This Court has firmly established that it is substance, rather than form, that should prevail. As noted above, the Federal Rules and this Court's precedents stand for the proposition that the merits of pleadings are to be determined on summary judgment or at trial after full and fair discovery. *Leatherman, supra,* at 168-69; *Swierkiewicz, supra,* at 998. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). This Court has also declared that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King*

& Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2332, 81 L.Ed.2d 59 (1984). The *Clausen* court's hyper-technical pleading requirements are irreconcilable with these directives.

In this case concerning unnecessary and duplicative lab tests, the defendant was put on notice of the date and location of the test, the patient name, the code used to bill the test, the duplicative or unnecessary nature of the test for the particular patient, the orders for tests, the lab results and various other details that sufficiently put defendant on notice as to what was at issue in the case. App. at 23, 31-35. In fact, the district court found that there was sufficient detail as to all the prima facie elements of the claim except the date and amount of the claims. *Id.* at 31. After identifying the specific dates of the tests, the complaint alleged that the claim was submitted to the government "on or within" a few days after the test was performed. *Id.* The *Clausen* court apparently concedes that the complaint had sufficient particularly to meet the "notice" requirement of Rule 9(b), but upheld the dismissal with prejudice on the sole technicality that "[n]o amounts of charges were identified [and no] actual dates were alleged," stating that the "failure to plead all the elements of [the] claim with specificity violates an equally strong purpose of Rule 9(b) – protecting defendants from frivolous suits, or 'spurious charges of immoral and fraudulent behavior.'" *Id.* at 24, 27 n.24 (quoted citations omitted). In other words, even though one pleads nearly all the elements with sufficient specificity and although the defendant has sufficient notice to meet the Federal Rule requirements, federal courts can dismiss the case because not pleading with specificity each and every element somehow renders the case frivolous as a matter of law. It could not be more obvious that this has become a game of pleading technicalities.

Moreover, federal courts, like *Clausen,* that refuse to allow discovery because that would allow the party to plead with specificity, set up "a game" whereby the "merits" of a claim are determined by the pleader's memory, access to information, or drafting skill. Not only does this opinion give no quarter to the practical reality that whistleblowers are unlikely to have all of this information at the time of filing, it refuses to relax the new FCA field code for complex fraud matters occurring over the course of several years where the information is in the possession of the defendant. *Id.* at 27 n.24, 28 n.25. Indeed, the *Clausen* court now requires either that Relators abscond with all the right documents before termination or that they have an incredible memory capable of spitting out the details of complex fraud to the point where they can name, pre-discovery, all the players, the dates, and the amounts. In the case of Medicare or similar claims this becomes even more problematic, as years' worth of patient names, dates of service, and complex billing codes will be hard to come by and harder to memorize.

The *Clausen* court conceded that the information with which to meet the new pleading standard was in the possession of the government, but refused to allow limited discovery to obtain this information, thus making it impossible to meet the pleading requirement. App. at 28 n.25; *see also id.* at 27 n.24 (without specific pleading requirements weeding out cases, plaintiffs could "learn the complaint's bare essentials through discovery"). Federal courts are essentially thumbing their noses at *Hishon* by conceding that the information necessary to meet their particularity requirements is available through discovery, but since plaintiffs did not obtain them before filing, their complaints are to be dismissed with prejudice. *See* App. at 28 n.25 (while plaintiff did not have the information the government did); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999)

(documents necessary for Rule 9(b) in possession of HCFA).[3] In other words, it is not that relief cannot be granted "under any set of facts", but rather that plaintiff has not obtained the facts, pre-discovery, upon which relief may be granted. Rather than providing even limited discovery to allow plaintiffs to plead with the requisite specificity, federal courts are dismissing the cases with prejudice for failure to state a claim. If the essentials are discoverable and support a meritorious complaint, it is antithetical to the rule in *Hishon* to dismiss the case on a pleading technicality.[4]

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[3] Moreover, these courts have been less than clear as to how relators are to obtain information from the government without court sanctioned discovery. If they suggest that relators can build a case with information obtained through FOIA, they fail to recognize several obvious problems. For example, complaints based on FOIA requests have been dismissed on public disclosure grounds. *See United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383 (3d Cir. 1999). In addition, failing to be the first to file while waiting for FOIA information would be cause for dismissal. 31 U.S.C. § 3730(b)(5). Filing a FOIA request while the case is under seal could violate the seal. 31 U.S.C. § 3730(b)(2). Finally, FOIA's complex rules and exceptions and the ability to redact information (such as patient names) make it unlikely that it would provide all the information the courts now require. *See e.g.*, 5 U.S.C. § 552(b)(6). Far more effective in preserving meritorious claims where the plaintiff did not have all the requisite information at the time of filing would be to allow limited discovery to obtain all such information.

[4] This also ignores this Court's analysis of Rule 11(b)(3) which allows pleadings to be based upon evidence reasonably anticipated in discovery. *Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (citing *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1050-51 (7th Cir. 1998) as an example of relaxing Rule 9(b) where "plaintiff lacks access to all facts necessary to detail claim.").

III. The *Clausen* opinion conflicts with this Court's precedents by extending Rule 9(b) to a statutory cause of action that expressly does *not* require fraud.

This Court has seen a recent trend of cases where federal courts have attempted to set up heightened pleading standards to avoid focusing the litigation on the merits and to protect defendants from the inconveniences of defending what courts consider weak cases. In 1993, this Court granted certiorari in *Leatherman* "to decide whether a federal court may apply a 'heightened pleading standard' – more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure – in civil rights cases alleging municipal liability under Rev. Stat. § 1979, 42 U.S.C. § 1983." *Leatherman*, *supra*, at 164. In a unanimous opinion authored by Chief Justice Rehnquist, the Court found that while Rule 9(b) imposes a heightened pleading standard, it does not mention section 1983. *Id.* at 168, 113 S.Ct. at 1163.

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Id. at 168-69.

Just this year, this Court in *Swierkiewicz* considered "whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*. . . ." *Swierkiewicz*, *supra*, at 995. In a unanimous opinion authored by Justice

Thomas, this Court found that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' *Leatherman, supra*, at 168." *Id.* at 999. In its analysis, the Court noted that Rule 9(b) made no mention of employment discrimination. *Id.* at 998.

Similarly, Rule 9(b) makes no mention of the FCA. Moreover, the FCA does not require fraud to state a cause of action. *See* 31 U.S.C. § 3729(b) ("no proof of specific intent to defraud is required"). While fraud may make a claim false, Congress went out of its way to make the pleading or proof of fraud unnecessary to prevail in an FCA case. *See* discussion below. Nevertheless, a growing line of federal courts have misapplied Rule 9(b) to the FCA – most without even meaningfully analyzing whether or not it should be so applied. App. at 14-18; *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Lab*, 149 F.3d 227, 234 (3d Cir. 1998); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995), *cert. denied*, 517 U.S. 1040 (1996). In the *Clausen* case, the analysis used to justify misapplying Rule 9(b) to FCA cases is as lacking as that rejected in *Leatherman* and *Swierkiewicz*.

In an act of pure judicial legislation, the *Clausen* court determined that Rule 9(b) should be extended to FCA cases because (1) an action can be brought under the act for "false or fraudulent" claims; (2) the Supreme Court and the Eleventh Circuit have consistently recognized it as "an anti-fraud" statute; and (3) the Eleventh Circuit has never required that a cause of action "overlap" common law

fraud in order to be subject to Rule 9(b). App. at 16-17. The third rationale is particularly troubling because it indicates that courts do not have to consider whether a statutory cause of action is even akin to an action in fraud before being subject to Rule 9(b). But extending Rule 9(b) to non fraud cases "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz, supra*, at 168. The *Clausen* court did not distinguish *Leatherman* or *Swierkiewicz* in its analysis – it simply ignored them. *See* App. at 16-17.

Continuing in reverse order, the second rationale is no stronger than the third. Rather than analyze the application of a Rule that requires "averments of fraud" to a statute that expressly *excludes* proof of fraud as a requirement, the court simply states that other courts have found it to be an "anti-fraud" statue. In actuality, the two citations of this Court's cases to support the position merely reference the fact that the FCA can reach fraudulent conduct, in no way limit FCA prosecutions to fraud, and concern only the statute prior to the 1986 amendments. *See Stevens, supra* at 781; *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed2d 1061 (1968). Neither these cases, nor the *Ragsdale* case (also cited by the court), contain a comparative analysis of the requirements, post-1986, of stating an FCA cause of action and the allegations triggering the application of Rule 9(b). *See Stevens, supra*; *Neifert-White, supra; see also Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1237 n.1 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000). Contrary to the *Clausen* implication, this Court has never held nor intimated that a case under the FCA is a cause of action solely in fraud and thus subject to Rule 9(b).

The *Clausen* court's first rationale is actually self-defeating. It points out that the statute uses the terms "false" and "fraudulent" throughout, and that a cause of

action may be brought for claims that are either "false" or "fraudulent". App. at 16. The fact that the statute distinguishes between "false" and "fraudulent" claims, however, undercuts the court's conclusion that the FCA is simply an anti-"fraud" statute. While a claim "may" be stated by showing fraud, if a valid claim may also be stated without an "averment of fraud", then there is no basis for dismissing the complaint under Rule 12(b)(6). *See Hishon, supra,* at 73. This point is strongly supported by the analysis with which this Court rejected the heightened pleading requirement in *Swierkiewicz*. "Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." *Swierkiewicz, supra,* at 997. Since an FCA plaintiff is not required to *prove* fraud in order to prevail, it is incongruous to require him to *plead* fraud in order to avoid dismissal.

As highlighted in *Leatherman* and *Swierkiewicz*, it is Congress and not the courts that should decide what statutory causes of action are subject to Rule 9(b). When Congress amended the FCA in 1986, it was aware that Rule 9(b) applied only to "averments of fraud," and not to all causes of action that may, but need not, be supported by such averments. If Congress had intended to subject complaints to a heightened pleading standard simply because they are brought under the FCA, it could have either (1) expressly included such a standard in the 1986

amendments,[5] or (2) required a plaintiff to prove fraud in order to prevail. Far from doing this, however, it made a point of providing that intent to defraud was *not required* to prevail on an FCA claim, thus clarifying that the FCA is not simply a "fraud" statute. Nothing in the FCA suggests that Congress intended to *expand* the reach of Rule 9(b) beyond its express language or to subject claims to the rule simply because they are brought under the FCA.

In fact, it is the "False" Claims Act and not the "Fraudulent" Claims Act. It is not required that a claim be fraudulent, but simply that it be false. *See* 31 U.S.C. § 3729(a)(1)-(7); *See also United States v. TDC Management Corp.*, 24 F.3d 292, 297 (D.C. Cir. 1994) (concluding that "Congress distinguished 'false' from 'fraudulent' claims and presum[ing] the distinction to turn on whether the defendant acted with an intent to deceive"). And with respect to the "knowing" requirement, Congress specifically provided that "*no proof* of specific intent to defraud *is required*," and that a person acts knowingly if he acts in "deliberate ignorance" or in "reckless disregard" of the truth or falsity of information. 31 U.S.C. § 3729(b) (emphasis added).

It is clear that, in imposing liability where a defendant acts with "reckless disregard" or with "deliberate ignorance" of the truth or falsity of information, the FCA imposes liability for actions that would not constitute "fraud," as that term is generally understood. As one of the sponsors of the 1986 amendments to the FCA stated, "Subsection 3 of Section 3729(c) uses the term 'reckless disregard of the truth or falsity of the information' which is no different than and has the same meaning as a gross

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[5] Congress has by statute required heightened pleading standards for other classes of claims. *See* 15 U.S.C. § 78u-4(b)(1)-(2) (requiring heightened pleading for securities fraud actions).

negligence standard that has been applied in other cases." 132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Berman), (quoted in *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997)).

In *Krizek*, the D.C. Circuit held that "reckless disregard" under the FCA is simply a type of negligence, and not a form of intent. The court reasoned that

> Section 3729(b)(2) of the Act provides liability for false statements made with deliberate ignorance. If the reckless disregard standard of section 3729(b)(3) served merely as a substitute for willful misconduct – to prevent the defendant from "deliberately blind[ing] himself to the consequences of his tortious action" – section (b)(3) would be redundant since section (b)(2) already covers such struthious conduct. . . . Moreover, as the statute explicitly states that specific intent is not required, it is logical to conclude that reckless disregard in this context is not a "lesser form of intent," but an extreme version of ordinary negligence.

Id. at 942 (citations omitted); *United States ex rel. Aakhus v. Dyncorp, Inc.*, 136 F.3d 676, 682 (10th Cir. 1998) (citing *Krizek* for proposition that "'gross negligence-plus,' is equivalent to reckless disregard for purposes of FCA").

Not only does the FCA not require fraudulent intent, it also does not require proof of many of the other elements traditionally required for fraud claims. For example, there is no need to prove that the government was actually damaged by any false statement. *See In re Schimmels*, 85 F.3d 416, 419 n.1 (9th Cir. 1996) (court must award civil penalty "even if no damages were caused by the false submissions"); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995); *United States v. Killough*, 848 F.2d 1523, 1532-34 (11th Cir. 1988); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 153 & n.5, 76 S.Ct. 219, 100 L.Ed 149 (1956).

Nor is it necessary to prove that the defendant made a specific false representation, or that the government reasonably relied upon any such representation. *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) ("Neither false certification nor a showing of government reliance on false certification for payment need be proven if the fraud claim asserts fraud in the provision of goods and services."); *United States v. Board of Educ.*, 697 F. Supp. 167, 179 (D.N.J. 1988) ("Actual reliance is not essential to the recovery of damages under the False Claims Act."). Indeed, a defendant may be liable under the FCA *even if government officials have full knowledge* of the material facts. *See Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 430 (6th Cir. 2001) ("even the government's knowledge of a fraud does not necessarily absolve a contractor from liability under the FCA"); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("That the relevant government officials know of the falsity is not in itself a defense.").

The fact that Congress did not intend to subject FCA cases to Rule 9(b) is also evident from the nature of an FCA claim itself. Congress in 1986 amended the FCA with the expressed intent "to encourage more private enforcement suits." S. Rep. at 23-24. At the same time, it clarified that specific intent to defraud need not be proven. 31 U.S.C. § 3729(b). It would be strange to suggest that Congress did this with the intent that such suits be subjected to extremely stringent pleading requirements designed for other types of situations, since in most cases the very whistleblowers that Congress intended to encourage will be unlikely to possess the detailed information necessary to satisfy such requirements. Congress intended to *reduce* the obstacles to whistleblowers' access to federal court, in order to benefit the taxpayers who have been wronged – it did not intend to tear down one obstacle, merely to erect another.

IV. Courts cannot be allowed to simply pay lip service to this Court's long-standing precedents and the bedrock principles of the Federal Rules.

A. Courts should not be allowed to use Rule 9(b) to make credibility determinations.

It is apparent that the *Clausen* ruling was not in fact grounded on "particularity" concerns, but rather on the fact that the court did not "believe" the plaintiff. This fact was obvious to the dissent:

> It may be that the majority reaches the conclusion it does because it suspects that Clausen's lawsuit is without merit. . . . A court should not rely on its estimation of the merits of the underlying suit when deciding whether a complaint has complied with Rule 9(b). My concern with the law the Court makes today is that it is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation.

App. at 36.

It is a bedrock principle of the Federal Rules that on motions to dismiss courts must accept all allegations as true. "Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz, supra,* at 996 n.1. In addition, all inferences are drawn in the light most favorable to the nonmovant. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon, supra,* at 73. "[O]n a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (quoted citation omitted).

It is clear from the *Clausen* opinion that it was not the lack of particularity that bothered the court, but rather the assumed lack of credibility of the allegation that claims were submitted to the government. The court acknowledged that Relator *alleged* that claims were submitted " 'on the date of the service or within a few days thereafter.' " App. at 11. The court apparently accepted that this was particular enough to put the defendant on notice, but felt it was somehow not "particular" enough to protect defendant from what the court suspected was a frivolous suit. *Id.* at 27 n.24; *id.* at 31 (dissent recognizing admission of majority that defendant got sufficient notice).

While the court recognized that it could not ask for evidence or proof on a motion to dismiss, the dissent noted, "The majority wants Clausen to provide 'copies of bills or payments.' But that is to say the majority asks for proof, and proof is not required at the pleading stage." *Id.* at 35. Rather than truly seeking specificity, the court really wanted "some indicia of reliability". *Id.* at 11-22. The court peppered its opinion with comments that Relator failed to provide "any factual basis" or alleged facts "without any additional explanation or support". *Id.* at 22, 23, 26 and n.23, 27 n.24. This culminated in the statement that while Relator *specifically alleged* that defendant billed the government for hundreds of improper tests, "we cannot . . . *assume* LabCorp actually billed the Government in whole or in part for all tests it 'took the trouble to order.' " *Id.* at 26 n.23 (emphasis added). Thus, it is clear that if the court had accepted the credibility of the allegations, it would have found them "sufficiently specific". *Id.* at 27 ("But we cannot be left wondering whether a plaintiff has offered mere conjecture *or* a specifically pleaded allegation on an essential element of the lawsuit." (emphasis added)). The point of the Federal Rules is to use liberal discovery and

summary judgment to determine the merits of a claim, rather than relying on the gut feeling of the federal court. *Swierkiewicz, supra* at 998.

Even the suggestions by the court as to how Relator might have survived Rule 9(b) had nothing to do with particularity, but rather with credibility. For example, the court suggested that it would have found Relator's complaint sufficient if it had included information regarding LabCorp's "policies about billing," or even "second-hand information about billing practices." App. at 24 and n.21. Such information would provide no more "particularity" regarding the submission of false claims than is already in the complaint. Rather, it would simply constitute circumstantial evidence tending to support the *truth* of Relator's allegations. In other words, if LabCorp had a policy of billing for tests it performed in furtherance of its scheme to defraud the government, then one is more likely to *believe* Relator's express allegation that LabCorp did in fact bill for the tests it performed.

In rejecting Relator's allegations that LabCorp actually submitted claims for payment with respect to the improper tests identified in the complaint, the majority repeatedly characterized such allegations as "conclusory." *Id.* at 21, 23, 24, 25 n.21, 26. This characterization is completely mistaken, and fails to recognize that only those "conclusory" allegations which are conclusions of law may be disregarded upon a motion to dismiss. "[U]nsupported *conclusions of law or of mixed fact and law* have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Marsh v. Butler County,* 268 F.3d 1014, 1036 n.16 (11th Cir. 2001) (emphasis added). An allegation that a claim was submitted on or about a particular day, however, is in no sense a "legal conclusion," as its truth does not depend

on an issue of law.[6] While the allegation may ultimately remain unproven, it is at this stage an allegation of *fact* which must be accepted as true for purposes of a motion to dismiss. *Leatherman, supra,* at 164; *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002) ("While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing the grant of a motion to dismiss, we are required to accept the allegations in the complaint as true.").

B. Courts must liberally allow amendments to insure that cases are decided on the merits.

The Eleventh Circuit, and other courts, have started to change the liberal amendment rule to a two strike rule, giving plaintiffs one chance to amend. "The plaintiff was entitled to 'one chance to amend the complaint and bring it into compliance with the rule.'" App. at 15 (quoting *Cooper, supra,* at 568). This new attitude about amendments is neither liberal nor focused on the merits, but rather is focused on the technicalities of the pleadings. This new amendment rule is completely irreconcilable with this Court's precedents.

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[6] Indeed, the majority's decision to treat the allegations regarding claim submission as "conclusory" stands in stark contrast to its treatment of Relator's other factual allegations. For example, the complaint provided no particular "factual basis" for most of Relator's allegations that specific tests were performed on specific days on specific patients, yet the majority had no trouble accepting the truth of such allegations. It is only when Relator alleged that a claim was submitted for payment to the government that the majority refused to credit the truth of such allegation. Yet conceptually, both types of allegations are entitled to the same treatment on a motion to dismiss – they are to be accepted as true.

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; *this mandate is to be heeded.* If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given." . . . [O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, supra at 182 (emphasis added).

The *Clausen* opinion established a new heightened pleading standard and defined the requirement that every element of a prima facie case be pled with excruciating particularity, but did not then allow Relator to try to meet the new standard. Even with a "two strikes and you're out" amendment policy, after establishing a new standard, the court should allow at least one chance to meet the new standard.

For the very first time on appeal, Relator learned that he could have satisfied Rule 9(b) by providing "policies about billing or even second-hand information about billing practices" or "additional explanation or support" linking the testing schemes to submissions of claims. The court also suggested that Relator could have pled on information and belief if he provided a factual basis for the belief. App. at 28 n.25. These were not options provided by

the district court. Taking the court at its word that this would have sufficed, Relator should have been given an opportunity to amend. Had the district court outlined these new rules the way the court of appeals did, Relator could have added this to the complaint that was dismissed. Relator should have had at least one chance to meet the new standard.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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UNITED STATES OF AMERICA, ex rel., JEFFREY SCOTT CLAUSEN, Plaintiff-Appellant, versus LABORATORY CORPORATION OF AMERICA, INC., Defendant-Appellee.

No. 01-13312

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

290 F.3d 1301; 2002 U.S. App. LEXIS 8899; 15 Fla. L. Weekly Fed. C 560

May 9, 2002, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 97-02200-CV-TWT-1. Judge: Thomas W. Thrash.

United States ex rel. Clausen v. Laboratory Corp. of Am., 198 F.R.D. 560, 2000 U.S. Dist. LEXIS 17162 (N.D. Ga. 2000).

DISPOSITION:

AFFIRMED.

COUNSEL:

For Jeffrey Scott Clausen, Appellant: G. Mark Simpson, Roswell, GA. Mike Bothwell, Attorney at Law, Roswell, GA. Scott A. Powell, Hare, Wynn, Newell & Newton, Birmingham, AL. Don McKenna, Birmingham, AL. Jennifer M. Verkamp, James B. Helmer, Jr., Frederick M. Morgan, Jr., Helmer, Martins & Morgan Co., L.P.A., Cincinnati, OH.

For Laboratory Corporation of America, Inc., Appellee: Jeffrey W. Willis, Atlanta, GA. Nicholas G. Stavlas, Joseph H. Young, Hogan & Hartson, LLP, Baltimore, MD.

JUDGES:

Before BARKETT, HULL and KRAVITCH, Circuit Judges.

OPINION BY:

HULL

OPINION:

HULL, Circuit Judge:

In this qui tam action, the plaintiff-relator seeks to recover damages under the False Claims Act, 31 U.S.C. § 3729 et seq., as a result of alleged overbilling of the United States Government by the defendant medical testing company. The district court, however, twice dismissed the plaintiff's complaint for failing to provide the specificity required under Federal Rule of Civil Procedure 9(b). We affirm.

I. BACKGROUND

A. The Parties

This case revolves around the billing practices of the defendant, Laboratory Corporation of America, Inc., ("LabCorp"). LabCorp is an Atlanta-based company that performs medical testing services nationwide and specializes in providing testing on a contract basis to long-term care facilities ("LTCFs").[1]

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[1] LabCorp was formed through a merger of two other companies – Roche Biomedical Laboratories, Inc., and National Health Laboratory, Inc. – in the mid 1990s. Because LabCorp assumed all liabilities of

(Continued on following page)

LTCFs, which include nursing homes, furnish skilled and unskilled care in a residential setting to patients that are often old or disabled. Many LTCF patients participate in medical insurance programs receiving funds from the United States Government ("Government"), such as Medicaid, Medicare and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Between the late 1980s and 1998, LabCorp provided laboratory testing services on a contract basis to at least 100 LTCFs in Georgia and at least three regional or national LTCF chains – Golden Age, Beverly, and Capital Care Management.

Plaintiff Jeffrey Scott Clausen ("Clausen") works in the medical testing industry. A resident of Georgia, he is a former employee of SmithKline Beecham Clinical Laboratories and identifies himself as a current competitor of LabCorp. He does not claim to have ever worked for LabCorp. He filed this action on behalf of the United States as a relator under the False Claims Act, entitling him to a percentage of any recoveries through judgment or settlement.

B. The Allegations

In his complaint, Clausen alleges that LabCorp engaged in a multi-faceted, decade-long campaign to defraud the Government as a result of its testing services

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these predecessor companies, we refer simply to LabCorp when discussing the alleged conduct of the defendant and its predecessor entities.

for LTCFs.[2] The essence of his allegations is that between the late 1980s and 1998 LabCorp performed unauthorized, unnecessary or excessive medical tests on LTCF residents who participated in Government-funded health insurance programs and then knowingly submitted bills for this work to agents of the Government, requesting taxpayer funds to which it was not entitled.[3] Clausen also alleges that although LabCorp was entitled to receive payments for some work related to its testing services, such as blood draws and transportation costs, it overbilled for those services during this time period as a result of the improper tests it performed.

Specifically, Clausen asserts that LabCorp engaged in six "schemes" that led it to submit false claims, either electronically or manually, to the Government through a fiscal intermediary that processes health insurance claims on its behalf. Clausen identifies the schemes, which overlap each other to some extent, as involving (1) self-referral, whereby LabCorp employees would establish standing orders for particular tests, for example every month, three months or annually, without requiring physicians' orders or without regard to medical necessity,

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[2] Because this appeal involves motions to dismiss for failure to state a claim, we must accept the facts in Clausen's complaints as true. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc). However, if the facts alleged do not satisfy the requirements of the Federal Rules of Civil Procedure, a claim has not been stated. *Theoharous v. Fong*, 256 F.3d 1219, 1226-27 (11th Cir. 2001).

[3] Clausen alleges that in 1997 and 1998 LabCorp discontinued the challenged practices after informing its LTCF clients that its actions had been improper.

(2) patient screening, whereby LabCorp would perform screening tests to establish a baseline for its records, (3) duplicative and unnecessary testing of patients with multiple disorders, (4) unbundling of tests, whereby multiple tests were given when a single test that included all of those multiple tests could have been given, (5) duplicative billing for blood draws, whereby all duplicative and unnecessary tests included charges for blood draws, and (6) duplicative billing of trip charges, whereby trip charges were assessed for unnecessary or duplicative trips or in excess of the number of actual trips made for legitimate tests.

At the core of most of these schemes is an allegation that LabCorp breached a cardinal rule of federal health insurance reimbursement policy: providers are generally entitled to be paid for medical testing only when such testing is (1) medically necessary and/or (2) done at the direction of a patient's physician. *See*, for example, 42 U.S.C. §§ 1395f(a), 1395x(v)(4), 1395y(a) (regarding Medicare and Medicaid testing reimbursement).

Because Clausen's appeal turns on the sufficiency of his pleadings, we first review the evolution of his complaint.

C. Clausen's Complaint

Pursuant to the False Claims Act, which permits citizens to file suit on behalf of the United States when it is the victim of fraud and abuse, Clausen filed a complaint under seal in the United States District Court for the Northern District of Georgia on July 28, 1997. The 11-page Complaint alleged that in providing testing services to LTCFs LabCorp (1) violated the False Claims Act by

knowingly submitting false claims for payment to the United States, making or using false records to do so, and conspiring to defraud the Government on such matters, 31 U.S.C. § 3729,a(1)-(3) (Counts I, II and III), and (2) improperly billed for services rendered through illegal kickback and self-referral schemes, 42 U.S.C. § 1320a-7b (Count IV).[4]

This version of the complaint alleged that LabCorp had engaged in the six schemes, but it did not identify any LTCFs by name, include any documentary exhibits or explain the origin of its information.[5] After multiple requests for extensions of time and the completion of its own investigation, the Government informed the district court on January 18, 2000, that it declined to intervene in the action as a matter of right, leaving Clausen to prosecute the action on its behalf. Clausen did not serve this version of his complaint on LabCorp.

D. Clausen's First Amended Complaint

Instead, exercising his option to amend the complaint prior to causing the seal to be lifted with its service, Clausen filed and served upon LabCorp his First Amended Complaint on May 10, 2000, with his current counsel added to the pleadings. This 23-page pleading reorganized

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[4] We do not discuss the allegations related to the Counts III or IV in this version of the complaint because Clausen omitted them from the current version of his pleadings, and they are not implicated in any issue on appeal.

[5] We do not provide more detail regarding the initial Complaint because this pleading was never the subject of a motion before the district court and is not at issue in this appeal.

the allegations into two counts – one regarding violations of the False Claims Act (Count I)[6] and the other regarding violations of federal anti-kickback and self-referral laws (Count II). The document offered additional support for Clausen's allegations, namely: (1) factual references to Clausen's conversations with LabCorp employees Olin Ausburn and Jofrancis Williams about the company's policies and procedures, (2) specific descriptions and (in some instances) technical codes for medical tests as examples of what the alleged false claims would have stated and a reference to the specific form on which claims would have been submitted to Medicare ("HCFA Form-1500 (electronically or manually)"), and (3) the testing histories of three patients identified by their initials (H.L., L.W. and M.A.) at two named LTCFs – A.G. Rhodes Homes, Inc., in Atlanta ("Rhodes LTCF") and Social Circle Intensive Care Facility in Social Circle, Georgia ("Social Circle LTCF").[7]

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[6] In this version of the complaint, the False Claims Act conspiracy allegation was omitted. 31 U.S.C. § 3729(a)(3).

[7] In addition, the First Amended Complaint added a number of documentary exhibits to support its allegations, but the documents relate only to the medical tests performed, and on whom and where they were performed, and do not include any billing records of LabCorp or references to sums charged to the Government by LabCorp: (1) a roster of "some of the LabCorp employees with knowledge of, and/or responsible for implementing, administering LabCorp's LTC [long-term care] program and carrying out the schemes alleged herein, during the late 1980's through 1997" – 20 individuals working in the Atlanta area identified by name, title and dates of employment, (2) a LabCorp sales brochure describing the services it provided to LTCFs, (3) patient lists (by patient initials and room number) for three Georgia LTCFs – Rhodes LTCF, Social Circle LTCF and the Hospitality Care Center of Madison in Madison, Georgia ("Madison LTCF") – identifying each

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Clausen's First Amended Complaint used the patient list and standing order documents to point to specific cases of allegedly improper testing. For example, the complaint asserted that LabCorp performed "self-referred" tests on a patient at the Rhodes LTCF identified as F.C. and being in room 225 between May 1995 and March 1997. In addition, Clausen described the tests performed on patients identified as H.L., L.W. and M.A. as examples of the self-referral scheme and other schemes involving duplicative testing, annual screening and duplicative and unnecessary billing for blood draws and trip charges. These tests, along with others like them identified in the patient lists, the complaint asserted, "resulted in the submission of false claims to the United States" nationally between "the late 1980s and 1997."

While adding certain detail, the First Amended Complaint did not include any further allegations about what other unnamed LTCFs might have been involved in this arrangement, the specific dates or amounts of any claims submitted to the Government, or copies or detailed sources of information about the claims themselves.

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patient's standing orders, procedures or test performed and dates of service during portions of 1995-97 and the specific scheme related to each test (i.e., unnecessary "screening," "unbundling" or "duplicative"), (4) a 1997 "standing order" report from the Rhodes LTCF facility, (5) test results and physician orders for patients H.L., L.W. and M.A. at the Social Circle and Rhodes LTCFs, (6) a table showing five component tests of an annual profile test to illustrate unbundling and unnecessary tests, (7) a list of "some of LabCorp LTC clients, 1987-1997" – 40 LTCFs in Georgia listed by name and city, and three companies that allegedly had "LTC group contracts, regional & national" with LabCorp, and (8) a sample of a LabCorp testing form from the Monroe Nursing Home served by LabCorp.

E. LabCorp's First Motion to Dismiss

LabCorp moved to dismiss Clausen's First Amended Complaint on July 31, 2000, arguing that it failed to meet the required standard for pleading fraud under Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"). The district court granted this motion as to Count I, ruling that (1) Rule 9(b)'s requirement that fraud be pleaded with particularity applies to False Claims Act actions, (2) Rule 9(b)'s pleading standard should not be relaxed here, and (3) Clausen failed to meet Rule 9(b)'s standard because he alleged no specific facts regarding the actual submission or timing of false claims and relied on conclusory statements, but that (4) Clausen could amend his complaint and attempt to come into compliance with the rule. *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 198 F.R.D. 560 (N.D. Ga. 2000).[8]

The district court pointed out that Clausen's complaint makes relatively detailed statements about the alleged schemes carried out by LabCorp. The district court noted, however, that Clausen only ends the description with a conclusory summation that typically states "these practices resulted in the submission of false claims for payment to the United States." *Id.* at 563. The district court thus concluded, "Plaintiff has failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified in the Amended Complaint. Essentially, Plaintiff has set out the process by which Defendants could have produced false claims, but

[8] The district court declined to rule on the motion to dismiss Count II prior to Clausen's filing of his Second Amended Complaint, which ultimately omitted Count II.

provides no facts that this process did in fact result in the *submission* of false claims." *Id.* (emphasis in original).

F. Clausen's Second Amended Complaint

On December 29, 2000, Clausen filed his Second Amended Complaint, which deleted Count II and sought to respond to the district court's concerns about Count I.

Specifically, the 28-page revised pleading explained at greater length that the patient lists included evidence of the various schemes. This time Clausen attached one blank "Health Insurance Claim Form" known as a Health Care Financing Administration Form 1500. Health care providers complete Form 1500, either electronically or manually, when they seek reimbursement from a federal health insurance program. This sample Form 1500 contains Section 24, which has blanks for the date, type and place of service, medical test codes (known as the CPT codes) and diagnosis codes. Clausen also attached a table of medical test codes, which lists different types of tests, such as glucose, cholesterol, hematocrit and urinalysis.

More importantly, Section 24 of Form 1500 also has blanks for the provider to list the financial charges for each separate service or test. This sample Form 1500 also contains Sections 28, 29 and 30, also in blank, for total charges, amount paid and balance due, respectively.

The revised pleading also changed the allegations that the schemes had simply "resulted in the submission of false claims" via manual or electronic Form 1500s to

intermediaries to state that electronic versions were submitted "for the services provided on the date of service or within a few days thereafter."[9] Finally, Clausen also described how certain examples of improper testing would have been identified on Form 1500s, including additional references to specific medical test codes.

The Second Amended Complaint suggested one can understand many details about the alleged false claims by (1) looking at one of the three LTCF patient lists identifying what tests each patient was receiving,[10] (2) obtaining the appropriate codes for those tests from the medical test code chart, and (3) turning to the blank Form 1500 to see how LabCorp would have filled out a claim for each individual with this information.

But still no copies of a single actual bill or claim or payment were provided. No amounts of any charges by LabCorp were identified. No actual dates of claims were alleged. Not a single completed Form 1500 was provided. No policies about billing or even second-hand information about billing practices were described, other than to state

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[9] This language appears to apply to all six schemes. It is mentioned explicitly in regard to the self-referral and patient screening schemes, and incorporated through examples cross-referenced in descriptions of the duplicative testing and unbundling schemes. Finally, the blood draw and trip charge schemes, which also cross-referenced other schemes with this same alleged timing of submission, include assertions that bills for these practices were submitted on the same dates as the bills for tests involved in the previous four schemes.

[10] In the Second Amended Complaint, the title of the column on the patient lists formerly titled "test(s) performed" was changed to "procedure or test billed to Medicare." These patient lists also included full patient names instead of simply initials.

that electronic Form 1500s with certain medical test codes were used. Basically, Clausen did not add any billing information to support his allegation that actual false claims were submitted for payment, such as the amount of any charges. Instead he attached one blank claim form and alleged that certain tests would have been billed on this form with certain test and diagnostic codes filled in.

G. LabCorp's Second Motion to Dismiss

On February 14, 2001, LabCorp filed a motion to dismiss Clausen's Second Amended Complaint. On May 16, 2001, the district court concluded that Clausen's revised pleading "suffers from the same defect as the [First] Amended Complaint" in that it did not "identify a single fraudulent claim by date filed, amount or claim number that was actually submitted to the government." The district court pointed out that "[i]dentifying the type of claim form used and stating that a claim was filed on the day of service or a few days thereafter is not sufficient to identify the fraud claims with sufficient particularity" to comply with Rule 9(b) in the context of this case. Continuing to enforce the dictates of Rule 9(b), the district court added that "the particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single false claim by amount."

Clausen timely appealed the dismissal of his complaints.[11]

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[11] We review de novo a district court's dismissal for failure to state a claim, applying the same standard used by the district court. *United*

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II. DISCUSSION

We initially discuss the False Claims Act, then review Federal Rules 8(a) and 9(b), and turn to Clausen's complaints.

A. The False Claims Act

The False Claims Act ("the Act") permits private persons to file a form of civil action (known as qui tam) against, and recover damages on behalf of the United States from, any person who:

> (1) knowingly[12] presents, or causes to be presented, to an officer of employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim[13] for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a

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States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc).

[12] "Knowingly" means a person who "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b). Congress eliminated the requirement of proving specific intent in its 1986 amendments to the False Claims Act. (footnote added)

[13] "Claim" means "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c). (footnote added)

> false or fraudulent claim paid or approved by the Government

31 U.S.C. § 3729(a)(1)-(2). As the Supreme Court has often observed, this statute "was enacted in 1863 with the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War." *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 781 (2000) (quotations omitted). *See* also *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1237 n.1 (11th Cir. 1999) ("The purpose of the Act, then and now, is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward.") (citation omitted); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-98 (11th Cir. 1991) (tracing history of Act).

The alleged impropriety may not be the subject of a pending Government action, or publicly disclosed information of which the accuser does not have direct and independent knowledge. *Id.* § 3730(e). Statutory penalties include a civil penalty of between $5,000 and $10,000 per claim and treble damages. *Id.* § 3729(a). If, as here, the Government does not assert its statutory right to take over the case from the plaintiff, called a relator, he can recover between 25 and 30 percent of any monies recovered from a settlement or judgment plus reasonable expenses and attorneys' fees and costs. *Id.* § 3730(d).

B. Federal Rules of Civil Procedure 8(a) & 9(b)

Generally, federal civil complaints need only state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). And each averment should be "simple, concise, and direct," with no

technical form of pleading required. Fed. R. Civ. P. 8(e). However, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b).

On appeal, Clausen asserts that the district court incorrectly chose to apply Rule 9(b)'s particularity requirements to actions under the False Claims Act. He asserts that this Court has never "squarely analyzed" this issue, and that Rule 9(b) should not apply here because the False Claims Act creates liability for false, but not necessarily fraudulent, claims and does not require proof of specific intent.

First, this Court has addressed the application of Rule 9(b) to actions under the False Claims Act. In *United States ex rel. Cooper v. Blue Cross & Blue Shield of Fla.*, we agreed with the district court that a False Claims Act relator alleging a health plan administrator improperly submitted claims to Medicare needed to comply with Rule 9(b). *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 568-69 (11th Cir. 1994) (per curiam). In the context of discussing limitations on the ability of plaintiffs to bring False Claims Act suits when certain information has been publicly disclosed, we observed that Rule 9(b) prevents "[s]peculative suits against innocent actors for fraud," and explained that under Rule 9(b) allegations of fraud "must include facts as to time, place, and substance of the defendant's alleged fraud." *Id.* at 566-67 (citing *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988)). "This requirement makes it hard for many persons to bring a qui tam suit and guards against 'guilt by association.'" 19 F.3d

at 567. Turning to whether the plaintiff met the pleading requirements of Rule 9(b), we continued:

> The plaintiff's complaint must allege the details of the defendants [sic] allegedly fraudulent acts, when they occurred, and who engaged in them. *Durham v. Business Management Assocs.*, 847 F.2d 1505 (11th Cir. 1988). [Blue Cross] argued successfully below that Cooper's complaint did not satisfy Rule 9(b). We agree. Cooper made general conclusory allegations of fraud.

19 F.3d at 568. Despite this holding, however, we remanded the case because the plaintiff was entitled to "one chance to amend the complaint and bring it into compliance with the rule." *Id.* at 568-69.

Clausen believes Cooper analyzed the application of Rule 9(b) but not the threshold question of whether Rule 9(b) applies to all False Claims Act actions,[14] and thus did not create binding precedent on the latter issue. We disagree, but, in any event, we now make clear that Rule 9(b) does apply to actions under the False Claims Act.

We believe this is required because the Act subjects entities that knowingly submit "false or fraudulent" claims to the Government for payment or approval – or knowingly make, use, or cause to be made or used a false record or statement to get such claims paid or approved – to civil

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[14] At least three of our sister circuits have cited Cooper for the proposition that Rule 9(b) applies to False Claims Act actions. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2d Cir. 1995).

liability. 31 U.S.C. § 3729(a) (using other language such as "conspires to defraud" and "intending to defraud"). In addition, the Supreme Court and this Court have consistently recognized the Act as an anti-fraud statute. *See*, for example, *Stevens*, 529 U.S. at 781; *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968) (stating it "protects the funds and property of the Government from fraudulent claims") (citation and quotation omitted); *Ragsdale*, 193 F.3d at 1237 n.1. And, regardless of whether the elements or descriptions of a False Claims Act action are precisely the same as common-law fraud, this Court has never required such overlap as a prerequisite for the application of Rule 9(b) to parallel statutory realms. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (applying Rule 9(b) to securities fraud action); *Durham*, 847 F.2d at 1511 (applying Rule 9(b) to mail fraud allegation in RICO action).[15]

Thus, we agree with our sister circuits and a number of district courts in this circuit that have applied Rule 9(b) to False Claims Act actions.[16] Thus, the district court in

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[15] We also note that the False Claims Act's command that specific intent not be proven, 31 U.S.C. § 3729(b), does not conflict with Rule 9(b), which states that intent may be averred generally. *Gold*, 68 F.3d at 1477 (rejecting argument that Rule 9(b) only applies to common-law fraud and noting that "no reason is apparent why [Rule 9(b)] should not apply to [False Claims Act] claims"). Furthermore, the pleading of intent is not at issue in this case.

[16] *See Bly-Magee*, 236 F.3d at 1018 ("The [False Claims Act] is an anti-fraud statute. . . . Complaints brought under the [Act] must fulfill the requirements of Rule 9(b) – defendants accused of defrauding the federal government have the same protections as defendants sued for fraud in other contexts."); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (same); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999)

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this case correctly held that it was "well settled" and "self-evident" that the False Claims Act is "a fraud statute" for the purposes of Rule 9(b). 198 F.R.D. at 562 (quotations and citations omitted).[17]

(same); *LaCorte*, 149 F.3d at 234 (3d Cir. 1998) (same); *Gold*, 68 F.3d at 1476 (same); *United States ex rel. Schwedt v. Planning Research Group*, 313 U.S. App. D.C. 200, 59 F.3d 196 (D.C. Cir. 1995) (same); *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 101 F. Supp. 2d 1365, 1369 (M.D. Fla. 2000) (same); *United States ex rel. Sanders v. E. Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1413 (M.D. Ala. 1996) (same); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1051-53 (S.D. Ga. 1990) (same).

The leading commentator in this field also agrees with these decisions. *See* John T. Boese, *Civil False Claims and Qui Tam Actions* § 5.04 (2d ed. 2000 & Supp. 2002) ("It is widely accepted by courts that because the essence of a False Claims Act case is fraud, Rule 9(b) applies to [False Claims Act] cases. As a result, plaintiffs in [False Claims Act] cases, whether the government, qui tam relator, or both, must make far more detailed allegations in [False Claims Act] complaints than in most litigation. . . . The applicability of Rule 9(b) to qui tam actions is by now beyond dispute.").

We find it ironic that Clausen was himself a relator in *LaCorte*, in which the Third Circuit barred him from bringing a False Claims Act lawsuit against SmithKline Beecham regarding medical testing after a similar, but not identical, lawsuit had already been brought. 149 F.3d at 237. In rejecting Clausen's argument that the decision in *LaCorte* would lead to relators pleading "a very broad cause of action so as to preempt claims by later plaintiffs," the Third Circuit observed that Rule 9(b) "provides sufficient deterrence against overly broad allegations." (citing *Cooper*). *Id.* at 234.

[17] We note that this is "wholly consistent" with the purpose of the False Claims Act, which encourages people with knowledge of undisclosed fraud to come forward. *See Bly-Magee*, 236 F.3d at 1019.

C. The Dictates of Rule 9(b)

This Court has stated its views on what Rule 9(b) requires a plaintiff to plead and what purpose the rule serves. In *Ziemba*, for example, we observed that when fraud is alleged:

> The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior. The application of Rule 9(b), however, must not abrogate the concept of notice pleading. Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

256 F.3d at 1202 (quotations and citations omitted).

Thus, this Court has endorsed the dismissal of pleadings for failing to meet Rule 9(b)'s standards. *See*, for example, *id.* at 1210 (holding that despite existence of red flags, "series of inferences is too tenuous" to believe auditors knew of or were reckless in disregarding fraud when no "'tips,' letters, or conversations" supporting such knowledge were identified in complaint); *Hendley v. Am. Nat'l Fire Ins. Co.*, 842 F.2d 267, 269 (11th Cir. 1988) (concluding that Rule 9(b) was not satisfied when plaintiff "steadfastly refused to offer specifics" and "never earmarked any facts as demonstrative of fraud"); *Friedlander*

v. Nims, 755 F.2d 810, 813-14 (11th Cir. 1985) (concluding that although Rule 9(b) dismissal is "severe sanction," plaintiff's decision to ignore court's "sound and proper" recommendations about how to correct pleading deficiencies concerning scope of employee's authority warranted dismissal); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 970-71 (5th Cir. Unit B 1981) (affirming Rule 9(b) dismissal because "the complaint includes only conclusory allegations of fraudulent concealment").[18]

Thus, in *Cooper*, this Court's only published opinion applying Rule 9(b) to allegations under the False Claims Act, we concluded that a plaintiff must plead "facts as to time, place, and substance of the defendant's alleged fraud," specifically "the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them." 19 F.3d at 567-68; *see* also *Stinson*, 755 F. Supp. at 1052 (noting that when Rule 9(b) applies, "pleadings generally cannot be based on information and belief") (quoting *Stern v. Leucadia Nat'l Corp.*, 844 F.2d 997, 1003 (2d Cir. 1988)).

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[18] In other cases, this Court has found challenged complaints – read together with other documents in the record – to be sufficient. In Durham, for example, the Court observed that "allegations of date, time or place satisfy the Rule 9(b) requirement that the *circumstances* of the alleged fraud must be pleaded with particularity, but alternative means are also available to satisfy the rule." 847 F.2d at 1512 (emphasis in original). In that case, which involved summary judgment on mail fraud used as a predicate RICO act, this Court found that affidavits stating the title, sender and date of a specific letter received in addition to references to receiving additional letters by mail "[f]rom time to time during the next several years" from other named individuals satisfied Rule 9(b) concerning the use of mails. *Id.*

D. Clausen's Complaints

Applying Rule 9(b), the district court concluded that both Clausen's First Amended Complaint and his Second Amended Complaint suffered from a fatal flaw. The court observed that the First Amended Complaint "does not identify any specific claims that were submitted to the United States or identify the dates on which those claims were presented to the government" and "relies exclusively on conclusory allegations of fraudulent billing." 198 F.R.D. at 564. Of the Second Amended Complaint, which had added the conclusory statements that LabCorp submitted for specified tests on the "date of service or within a few days thereafter," the district court stated that the pleading "suffers from the same defect" – a lack of specific information about the actual submission of claims to the Government. We agree with these conclusions.

The False Claims Act does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) ("The statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the '*claim for payment*.' Therefore, a central question in False Claims Act cases is whether the defendant ever presented a 'false or fraudulent claim' to the government.") (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)); *Russell*, 193 F.3d at 308 ("Because such statements or claims are among the

circumstances constituting fraud in a False Claims Act suit, these must be pled with particularity under Rule 9(b)").[19] Without the *presentment* of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the False Claims Act. *Harrison*, 176 F.3d at 785 ("The False Claims Act at least requires the presence of a claim – a call upon the government fisc – for liability to attach."). The submission of a claim is thus not, as Clausen argued, a "ministerial act," but the sine qua non of a False Claims Act violation.

As such, Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government. As in *Cooper*, and as with every other facet of a necessary False Claims Act allegation, if Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of *an actual false claim* for payment being made to the Government. *See*, for example, *Butler*, 101 F. Supp. 2d at 1369 (applying Rule 9(b) and dismissing amended complaint

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[19] *See*, for example, *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 803 (8th Cir. 2001) (holding a prima facie case under the False Claims Act requires that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent).

under Act due in part to plaintiff "pleading a fraudulent scheme of conduct which may well be prohibited by law" but not pleading "any specific occurrences of a false claim").

In reviewing Clausen's complaints and taking their allegations as true, we agree with the district court that Clausen's failure to allege with any specificity if – or when – any actual improper claims were submitted to the Government is indeed fatal to his complaints under the particular circumstances of this case.[20] In none of his descriptions of alleged schemes by LabCorp to increase its testing and testing revenues – which are accompanied by dozens of pages of exhibits – does he provide any factual basis for his conclusory statement tacked on to each allegation that bills were submitted to the Government as a result of these schemes, or, as the Second Amended Complaint adds, that they were submitted "on the date of service or within a few days thereafter." At most, Clausen's complaints raise questions about LabCorp's internal

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[20] In light of this conclusion, we need not address whether Clausen's allegations about the schemes themselves were adequately pleaded. (We note that although the district court found "there is no question Plaintiff's [First Amended] Complaint is detailed regarding the process allegedly undertaken by LabCorp and its employees," LabCorp argues on appeal that the schemes are only pleaded in general terms and are insufficient as well.)

In addition, because of our holding, it is unnecessary to speculate whether Clausen adequately alleged who submitted any false claims. *See*, for example, *United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F. Supp. 2d 1201, 1216-17 (M.D. Fla. 1999) (noting that "complaint fails to refer to specific employees who may have been involved in submitting false claims") (discussing *United States ex rel. Robinson v. Northrop*, 149 F.R.D. 142 (N.D. Ill. 1983)).

testing policies. But nowhere in the blur of facts and documents assembled by Clausen regarding six alleged testing schemes can one find any allegation, stated with particularity, of a false claim actually being submitted to the Government.

Thus, Clausen's allegations have fallen short. And at no stage of this case did they reach their mark. For example, in Clausen's First Amended Complaint, he described the various schemes LabCorp allegedly implemented to generate unneeded or duplicative medical tests on unsuspecting LTCF patients. He even provided three LTCFs' patient lists for a few years and a handful of patients' lab results and standing orders to illustrate the tests LabCorp had performed. This set the stage for the consummation of this alleged nefarious plot to recover unjustified amounts of taxpayer money. But, as to the plot's execution, Clausen merely offers conclusory statements, and does not adequately allege when – or even if – the schemes were brought to fruition. He merely alleged that "these practices resulted in the submission of false claims for payment to the United States." No amounts of charges were identified. No actual dates were alleged. No policies about billing or even second-hand information about billing practices were described, other than to state that electronic HCFA Form 1500s with medical test codes were used. No copy of a single bill or payment was provided.[21]

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[21] The dissent suggests we ask for all of this information, and thus "ask[] for the impossible." To the contrary, this discussion merely lists some of the types of information that might have helped Clausen state an essential element of his claim with particularity but does not mandate all of this information for any of the alleged claims. Although

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The district court thus stated that LabCorp "could perform as many tests as it pleased as long as it only billed for the ones allowable under the applicable governmental program," and properly dismissed Clausen's First Amended Complaint because he "failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified." 198 F.R.D. at 563-64.

Unfortunately for Clausen, despite the district court's admonishments to include more information about claims actually submitted – including identification of actual, and not merely possible or likely, claims submitted, items on particular claim forms and the dates on which they were submitted to the Government – to attempt to comply with Rule 9(b), his Second Amended Complaint did not add much helpful information. To Clausen's credit, he preserved all of his allegations about the various schemes engaged in by LabCorp, attached a blank Form 1500[22] and described what medical test codes would be filled in on a

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Clausen has provided none of these items of information here, some of this information for at least some of the claims must be pleaded in order to satisfy Rule 9(b).

We cannot make assumptions about a False Claims Act defendant's submission of actual claims to the Government without stripping all meaning from Rule 9(b)'s requirement of specificity or ignoring that the "true essence of the fraud" of a False Claims Act action involves an actual claim for payment and not just a preparatory scheme. Even the example of patient H.L. cited by the dissent, while providing details of medical treatment, offers no factual basis for the conclusory allegation that LabCorp submitted actual improper claims for payment to the Government on the "date of service or within a few days thereafter."

[22] LabCorp attempts to diminish the significance of the form provided by Clausen by noting that the HCFA Form 1500 is "used by every Medicare and Medicaid provider to process every claim submitted to the government."

particular section of the form based on the tests previously alleged to have been performed according to his three Georgia LTCF patient lists. But he failed to provide any additional information linking the testing schemes to the submission of any actual claims or any actual charges. And he simply, and without any additional explanation or support, revised his allegation to include the conclusory allegation that LabCorp submitted bills to the Government "on the date of service or within a few days thereafter." If Rule 9(b) is to carry any water, it must mean that an essential allegation and circumstance of fraudulent conduct cannot be alleged in such conclusory fashion. But this is what Clausen offered in his Second Amended Complaint, asking that his conclusory allegations about the submission of claims by LabCorp be accepted without any factual basis.[23]

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[23] The dissent criticizes our conclusion that a False Claims Act plaintiff must allege some factual basis for the allegation that an actual claim in some actual amount was submitted. This is not "asking for the obvious," as characterized by the dissent. It is only obliging a relator to plead and support every essential element of his complaint with particularity under Rule 9(b) and our precedents. *See Ziemba*, 256 F.3d at 1202; *Cooper*, 19 F.3d at 567-68.

Contrary to the dissent's suggestion, we cannot (1) presume what LabCorp's billing policies were and assume LabCorp actually billed the Government in whole or in part for all tests it "took the trouble to order," (2) speculate that Clausen's late-in-the-game addition of vague and meaningless ranges for dates of submission of claims must "indicate he had some familiarity" with LabCorp's procedures, and (3) take comfort in the fact that the relevant false claims were not alleged to have been submitted "any differently" from legitimate payments for which we also have no specific information. We must leave the burden of pleading the particular facts behind the complaint's allegations to the plaintiff in this case.

When Rule 9(b) applies to a complaint, a plaintiff is not expected to actually *prove* his allegations, and we defer to the properly pleaded allegations of the complaint. But we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.[24]

We are not unsympathetic to the situation in which Clausen finds himself. Most relators in qui tam actions are insiders. As a corporate outsider, he may have had to work hard to learn the details of the alleged schemes entered into by LabCorp through years of making contacts in and

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[24] Clausen argues that his allegations give LabCorp enough information to formulate a defense to the charges, which is one of the purposes of Rule 9(b). *See Durham*, 847 F.2d at 1511. However, we believe Clausen's failure to plead all the elements of his claim with specificity violates an equally strong purpose of Rule 9(b) – protecting defendants from frivolous suits, or "spurious charges of immoral and fraudulent behavior." *Id.* (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). When a plaintiff does not specifically plead the minimum elements of their allegation, it enables them to learn the complaint's bare essentials through discovery and may needlessly harm a defendants' goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, are baseless allegations used to extract settlements. *See Stinson*, 755 F. Supp. at 1053 (referring to these as "other important purposes" of Rule 9(b)). This is especially so in cases involving the False Claims Act, which provides a windfall for the first person to file and permits recovery on behalf of the real victim, the Government.

We add that our holding that Rule 9(b) has not been satisfied applies equally to Clausen's claims styled as testing irregularities (the self-referral, duplicative test, screening and unbundling schemes) and billing irregularities (the blood draw and trip charge schemes) because, as stated previously, a false claim must be presented for any liability to attach under the False Claims Act. And Clausen provides no support for his allegations that any claims were actually submitted.

learning about the industry while not being privy to LabCorp's policy manuals, files and computer systems. But, while an insider might have an easier time obtaining information about billing practices and meeting the pleading requirements under the False Claims Act, neither the Federal Rules nor the Act offer any special leniency under these particular circumstances to justify Clausen failing to allege with the required specificity the circumstances of the fraudulent conduct he asserts in his action.[25]

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[25] We also reject Clausen's argument that we should apply a more lenient pleading standard because evidence of fraud was uniquely held by the defendant. Clausen is not without avenues for obtaining information. *See United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (declining to relax Rule 9(b)'s pleading standard because "documents containing the requisite information were possessed by other entities, such as the Healthcare Financing Administration"). Even if we were not to find that Clausen might obtain the necessary billing information from the Government, Clausen's conclusory statements are insufficient to justify relaxation. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (requiring factual basis for belief and noting that this exception "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations" and that "even where allegations are based on information and belief, the complaint must set forth a factual basis for such belief") (citations omitted); *Stinson*, 755 F. Supp. at 1052 (observing that even when standard is relaxed, "pleaders must allege that the necessary information lies within the defendant's control, and then allegations must be accompanied by a statement of facts upon which the allegations are based") (quotations and citation omitted).

Clausen also argues that Rule 9(b) should be relaxed because the fraud was complex. This exception may apply in appropriate circumstances to aid those alleging prolonged multi-act schemes. However, even under this exception, Clausen would have to allege at least some examples of actual false claims to lay a complete foundation for the rest of his allegations, which he has failed to do. *See* for example, *Thompson*,

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Because we find that Clausen failed to meet the minimum pleading requirements for the actual presentment of any false claims even as to the specific examples of identified patients and the three Georgia LTCFs and for which Clausen provided patient identities, dates of testing and testing procedures, it is beyond question that his allegations with even less specifically pleaded information must also fail. Thus, Clausen's pleadings about similar false claims at 37 other named Georgia LTCFs (for which small amounts of information or no information were provided), 60 unnamed Georgia LTCFs, three named regional or national LTCF chains and an unspecified number of other unnamed facilities nationwide between the late 1980s and 1998 – without any similar support – cannot be maintained under Rule 9(b).

III. CONCLUSION

For reasons stated herein, we AFFIRM the district court's dismissal of Clausen's First Amended Complaint

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125 F.3d at 903 (affirming dismissal of allegations after recognizing that while pleading on information and belief may be sufficient under this exception, it does not constitute a "license to base claims of fraud on speculation and conclusory allegations" and that "the complaint must set forth a factual basis for such belief") (citation omitted). Compare *Durham*, 847 F.2d at 1512 n.12 (approving of allegation that mails were used for a pattern of fraudulent activity based on an affidavit identifying use of the mails and describing the sender, title, recipient and precise date and method of sending) with *Butler*, 101 F. Supp. 2d at 1369 (noting that while the pleaded allegations are "illustrative of the type of fraud Plaintiff alleges," action must be dismissed because it did not "address any false claim or any document bearing a false claim on the part of the [eight health care facility] Defendants").

and Second Amended Complaint for failure to comply with Federal Rule of Civil Procedure 9(b).

AFFIRMED.

DISSENT BY:

BARKETT

DISSENT:

BARKETT, J., dissenting:

Clausen's complaint is not a model of clarity, but in my view it adequately complies with the requirements of Rule 9(b). Although not explicitly drawing a distinction, the majority characterizes the defect of Clausen's complaint in two ways: first, as a failure to allege the specific dates or amounts of false claims submitted to the government; and second, as a failure to provide a "factual basis" for the claim that bills were submitted to the government "on or within a few days" of the dates on which LabCorp allegedly performed unnecessary, duplicative, or otherwise improper tests. I will discuss these concerns separately, since they implicate different legal issues.

1. Dates and Amounts of False Claims

Rule 9(b) states that "the circumstances constituting fraud or mistake shall be stated with particularity." By itself, of course, that language does not tell us whether the failure to specify the amount of the false claim, or to indicate the precise date on which it was submitted rather

than a range of a few days, constitutes a lack of particularity that is fatal to the complaint. It is therefore necessary to look to the purposes of Rule 9(b), which the majority identifies, but, apart from one footnote, does not discuss: "The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quotations and citations omitted). It is also worth recalling that the district court deemed Clausen's complaint to have complied with the particularity requirements of Rule 9(b) at least insofar as it described the various arrangements or "schemes" by which LabCorp would allegedly perform medically unnecessary tests. Moreover, the complaint identified specific patients and specific dates on which those tests were performed. Thus, the question is whether a complaint that adequately alleges the schemes by which medically unnecessary tests are performed, and identifies the specific dates and patients on which those tests were performed, nonetheless frustrates the purposes of Rule 9(b) if it does not identify the specific amount of each claim and states that each claim was submitted to the government "on or within a few days" of the date on which the test was performed.

The majority appears to accept that the first purpose of Rule 9(b) – alerting defendants to the precise misconduct with which they are charged – would not be frustrated were Clausen's complaint permitted to survive. Obviously, the essence of the fraud in this case lies in the schemes to perform unnecessary tests, rather than in the claims for payment. Clausen does not allege that LabCorp

billed for the improper tests any differently than it bills for medically appropriate tests; the only issue is whether the underlying tests were medically necessary.[1] Thus, the schemes by which LabCorp allegedly performed medically unnecessary tests constitute the heart of the misconduct that LabCorp must defend against, and the district court did not question the adequacy of the particularity with which Clausen described those schemes.

Of course, if there was no claim for payment, then there was no fraud, but Clausen's complaint does allege that LabCorp billed for the tests performed as a result of these schemes.[2] LabCorp would be free to answer Clausen's complaint by showing that it never submitted bills for any of these tests. But the availability of this defense – however unlikely it is that LabCorp would resort to it – has no bearing on whether LabCorp has been sufficiently alerted to the misconduct with which it has been charged. Clausen has identified the specific tests he alleges to be improper and the reasons why they are

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[1] It would be different if Clausen alleged, for example, that LabCorp had billed for tests that it never performed. In that case the specific dates on which claims for payment were submitted to the government might well be necessary to satisfy the requirements of Rule 9(b). But that is not this case.

[2] The majority writes that "nowhere in the blur of facts and documents assembled by Clausen regarding six alleged testing schemes can one find any allegation, stated with particularity, of a false claim actually being submitted to the Government." That statement is simply not borne out by a reading of the complaint. For example, in paragraph 60 of his complaint, Clausen alleges that LabCorp performed an unnecessary Glucose test on patient H.L. on April 15, 1997, and that a claim for the test was submitted "on April 15 or within a few days thereafter" via electronic form HCFA 1500, with CPT code 82947.

improper, along with the patients and dates on which they were performed. The amount of, and precise date on which, bills for these tests were submitted to the government is not necessary to alert LabCorp to the nature of its alleged misconduct, and thus LabCorp cannot colorably contend that it is unable to discern from Clausen's complaint the misconduct in which it has allegedly engaged.

So let us consider the second purpose: protecting defendants against spurious charges of immoral and fraudulent behavior. Put another way, the rule protects defendants from frivolous lawsuits and from undeserved harm to their goodwill and reputation. *See*, e.g., *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). The particularity requirement accomplishes this purpose by requiring would-be plaintiffs to have a reasonable (and reasonably precise) basis for their allegations prior to discovery. But for the same reason that Clausen's allegations adequately alert LabCorp to the misconduct it must defend against, his complaint adequately satisfies the second purpose of Rule 9(b): it alleges with particularity the facts constituting the essence of the fraudulent conduct. It lays out the circumstances of the fraud that would not be a matter of common knowledge or common sense: namely, the schemes by which LabCorp allegedly performed medically unnecessary tests.

As the majority notes, "as a corporate outsider, [Clausen] may have had to work hard to learn the details of the alleged schemes entered into by LabCorp through years of making contacts in and learning about the industry while not being privy to LabCorp's policy manuals, files and computer systems." As the majority thus appears to recognize, the requirement that a plaintiff allege with particularity the testing schemes – along with specific

patients and dates on which allegedly improper tests were performed – will do much to protect defendants against spurious charges or frivolous lawsuits. While a requirement that the plaintiff further identify the precise dates and amounts of claims for payment may result in the dismissal of more lawsuits, there is no reason to think that the majority of the additional lawsuits dismissed will be frivolous ones. When an outsider like Clausen has no pre-discovery means of access to the dates on which the defendant submitted its claims for payment, the lack of that information tells us nothing about the likelihood that the lawsuit is frivolous. By alleging with particularity the schemes by which medically unnecessary tests were performed and identifying specific patients and dates on which those tests were performed, Clausen has, in my view, overcome the bar erected by Rule 9(b) to spurious charges or frivolous lawsuits.

2. The Factual Basis for Clausen's Allegations as to Claims for Payment

The majority suggests that Clausen's allegations regarding LabCorp's submission of claims for payment should be discounted or disregarded because they are "conclusory." Clausen, the majority complains, cites no facts in support of his allegation that bills were submitted for the tests performed. However, the majority itself identifies a potential problem with its argument: "When Rule 9(b) applies to a complaint, a plaintiff is not expected to actually prove his allegations and we defer to the properly pleaded allegations of the complaint." "But," the majority continues, "we cannot be left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit."

The "mere conjecture" to which the majority alludes, of course, is the allegation that LabCorp actually billed for the tests it performed. Taking as true Clausen's allegations regarding LabCorp's schemes – as we must on a motion to dismiss – his allegations regarding billing would appear to be mere conjecture only if we were willing to attribute to LabCorp a highly unusual business model that consisted in arranging for the systematic administration of medically unnecessary tests for which it never intended to be paid. I see nothing alarmingly conjectural about Clausen's allegation that LabCorp billed for the allegedly unnecessary tests it methodically took the trouble to order.

The majority wants Clausen to provide "copies of bills or payments." But that is to say the majority asks for proof, and proof is not required at the pleading stage. The majority also wants identification of the amounts of charges and the actual dates of claim submission. But the majority does not suggest that Clausen had any pre-discovery means of obtaining that information, so it asks for the impossible. Finally, the majority wants "policies about billing" or "second-hand information about billing practices." Perhaps Clausen could have found some information indicating that LabCorp – whose business is to perform medical tests for payment – had a policy of billing for the tests it performed. But here, the majority simply asks for the obvious.[3]

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[3] Moreover, does not Clausen's allegation that bills were submitted "on or within a few days" of the tests performed indicate that he had some familiarity with LabCorp's billing practices?

It may be that the majority reaches the conclusion it does because it suspects that Clausen's lawsuit is without merit. I do not know whether the suit has merit or not, but in any event, it is not relevant to the question before us. A court should not rely on its estimation of the merits of the underlying suit when deciding whether a complaint has complied with the requirements of Rule 9(b). My concern with the law the Court makes today is that it is undiscriminating, as likely to result in the dismissal of meritorious lawsuits as it is to protect defendants from unwarranted litigation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-13312-GG

UNITED STATES OF AMERICA,
ex rel., JEFFREY SCOTT CLAUSEN,

Plaintiff-Appellant,

versus

LABORATORY CORPORATION
OF AMERICA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___F.2d___).

(Filed Jul 5, 2002)

Before: BARKETT, HULL and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

The False Claims Act, 31 U.S.C. § 3729-3730

Sec. 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient of the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION. – This section does not apply to claims, records, or statements made under the internal Revenue Code of 1986.

Sec. 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. –

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. –

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the

course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter of arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation of proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government,

including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. –

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report,

hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into

account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED. –

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any

officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. – The Government is not liable for expenses

which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

SUPPLEMENTAL APPENDIX

(2)

Supreme Court, U.S.
FILED
OCT 3 2002
CLERK

No. 02-534

In The
Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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DISTRICT COURT ORDERS

United States of America ex rel. Jeffrey Scott Clausen v. Laboratory Corporation of America, Inc., 198 F.R.D. 550 (N.D. Ga. 2000) ..... App. 1

United States of America ex rel. Jeffrey Scott Clausen v. Laboratory Corporation of America, Inc., No. 97-CV-2200-TWT (N.D. Ga. filed May 16, 2001) ..... App. 14

UNITED STATES OF AMERICA ex rel. JEFFREY SCOTT CLAUSEN, Plaintiff, v. LABORATORY CORPORATION OF AMERICA, INC., Defendant.

CIVIL ACTION FILE NO. 1:97-CV-2200-TWT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

198 F.R.D. 560; 2000 U.S. Dist. LEXIS 17162; 48 Fed. R. Serv. 3d (Callaghan) 1271

November 29, 2000, Decided

DISPOSITION:

Defendant's Motion to Dismiss [Doc. 36] GRANTED.

COUNSEL:

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JUDGES:

THOMAS W. THRASH, JR., United States District Judge.

OPINION BY:

THOMAS W. THRASH, JR.

OPINION:

ORDER

This is a fraud action brought pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* It is before the Court on Defendant's Motion to Dismiss. [Doc. 36]. For the reasons set forth below, the Court grants Defendant's Motion to Dismiss.

I. BACKGROUND

On July 28, 1997, Plaintiff Jeffery Scott Clausen, a former competitor of Defendant, filed this action under seal pursuant to the *qui tam* provisions of the Federal False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* Defendant, Laboratory Corporation of American, Inc., is a Delaware Corporation with its principal place of business in Burlington, North Carolina. Defendant is a national commercial reference laboratory that performs medical testing on patients in hospitals, nursing homes and

medical offices. The initial complaint alleged that LabCorp violated the FCA by submitting false claims for payment to Medicare, Medicaid, and the Civilian Health and Medical Program of the United States ("CHAMPUS"). The United States declined to intervene in the action and, on January 21, 2000, the Court unsealed the complaint. Plaintiff filed an Amended Complaint on May 10, 2000.

The FCA makes liable to the United States any person who "knowingly presents, or causes to be presented, to . . . the Government . . . a false or fraudulent claim for payment or approval, [or] knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729(1) and (2). The history of the False Claims Act and the 1986 amendments to the Act have been described in detail by the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) and will not be repeated here. Plaintiff's complaint now alleges in Count I of the Amended Complaint that LabCorp violated the FCA by: (1) billing for tests performed through a system of self-referrals that disregarded physician orders and medical necessity (Amended Complaint ¶ 27-33); (2) improperly billing for patient screenings (Amended Complaint ¶ 34-38); (3) billing for duplicative and unnecessary testing (Amended Complaint ¶ 39-41); (4) over billing by "unbundling" laboratory procedures (Amended Complaint ¶ 42); (5) billing for additional and unnecessary blood draws due to the alleged unbundling of tests, duplicative and unnecessary testing, and patient screenings (Amended Complaint ¶ 43); and (6) billing for trip charges with each service performed during a single visit to a nursing home and billing for trip charges associated with alleged duplicative and unnecessary laboratory tests (Amended

Complaint ¶ 44-45). Count II alleges Defendant billed for services rendered through illegal kickback and self-referral schemes in violation of 42 U.S.C. § 1395nn(a)(1) and (h)(6) and 42 U.S.C. § 1320a-7b(b) (Amended Complaint ¶ 49-54). Defendant asks this Court to dismiss Counts I and II of the complaint for failure to fulfill the particularity requirement for pleading fraud according to Federal Rule of Civil Procedure Rule 9(b). As to Count II only, Defendant also asks that the Court dismiss for failure to state a claim for which relief may be granted pursuant to Rule 12(b)(6).

II. MOTION TO DISMISS STANDARD

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiff's claims for relief. Fed.R.Civ.P. 12(b)(6); see *Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Linder v. Portocarrero,* 963 F.2d 332 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construes them in the light most favorable to the plaintiff. See *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.,* 711 F.2d 989, 994-95 (11th Cir. 1983). Generally, notice pleading is all that is required for a valid complaint. See *Lombard's, Inc. v. Prince Mfg., Inc.,* 753 F.2d 974, 975 (11th Cir. 1985), cert. denied, 474 U.S. 1082, 88 L. Ed. 2d 892, 106 S. Ct. 851 (1986). Under notice pleading, plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. In cases involving fraud or mistake, however, a plaintiff must plead with particularity. Fed.R.Civ.Pro. 9(b).

III. DISCUSSION

Defendant argues that Plaintiff has not stated a claim for fraud with sufficient particularity. Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. Pro. 9(b). A complaint that presents in detail the "who, what, when, where, and how" of the alleged fraud has generally been held to comply with Rule 9(b). See, *Cooper v. Blue Cross and Blue Shield of Fla.*, 19 F.3d 562, 568 (11th Cir. 1994) (holding that the plaintiff's complaint must allege the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them); *Mathis v. Velsicol Chem. Corp.*, 786 F. Supp. 971, 976-7 (N.D. Ga. 1991) (dismissing allegation of fraud where it "[did] not state with particularity the specific situation involved, i.e., who, what, when, where, and how"). This heightened pleading requirement serves to inform defendants of the "precise misconduct with which they are charged and protect[s] defendants against spurious charges of immoral and fraudulent behavior." *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988). "Its clear intent is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed." *Friedlander v. Nims*, 755 F.2d 810, 813, n. 3 (11th Cir. 1985).

Plaintiff remarkably argues that the Court should hold that Rule 9(b) does not apply to FCA claims because statutory rather than common law fraud is involved. It is well settled, however, in this and other circuits, that Rule 9(b) applies to cases involving the FCA. *Cooper*, 19 F.3d at 568; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F.

Supp. 1040, 1051 (S.D. Ga. 1990); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476 (2nd Cir. 1995); *United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304, 308 (5th Cir. 1999). Rule 9(b) also applies to other statutory fraud claims such as RICO and securities fraud cases. *Brooks v. Blue Cross Blue Shield of Fla.*, 116 F.3d 1364, 1380 (11th Cir. 1997) (holding that plaintiffs are required to plead their RICO claims with the specificity required in Rule 9(b)); *Dudley v. Southeastern Factor and Finance Corp.*, 446 F.2d 303, 309 n. 6 (5th Cir. 1971) (holding that shareholders bringing a securities fraud action pled fraud with sufficient particularity to satisfy Rule 9(b))[1]. "It is self-evident that the FCA is a fraud statute." *Gold*, 68 F.3d at 1476. Requiring plaintiffs to plead fraud with particularity is necessary to provide the defendants with sufficient notice of the acts of which plaintiff complains to enable them to frame a response, prevent fishing expeditions to uncover imagined wrongs, and protect defendants from unfounded accusations of immoral and otherwise wrongful conduct. *Butler*, 74 F. Supp. 2d at 1215. These important policies are furthered regardless of whether the fraud is in statutory or common law form. This Court declines Plaintiff's invitation to hold that Rule 9(b) does not apply to FCA claims.

In the alternative, Plaintiff asserts that a strict adherence to Rule 9(b) is not warranted in this case. Plaintiff is correct that Rule 9(b) must not be read to

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

abrogate Rule 8(a) requiring notice pleading. *Friedlander,* 755 F.2d at 813 n. 3. "[A] court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of Rule 9(b) with the broader policy of notice pleading." *Durham,* 847 F.2d at 1511; *Friedlander,* 755 F.2d at 813 n. 3. The Plaintiff is also correct that in cases where the "fraud occurred over an extended period of time and consisted of numerous acts, the specificity requirements are applied less stringently." *United States ex rel. Butler v. Magellan Health Services, Inc.,* 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999). The heightened pleading standard may also be relaxed if the factual information that is the basis of the claim is peculiarly within the defendant's knowledge or control. *Stinson,* 755 F. Supp. at 1052. Because a strict pleading requirement could frustrate the purpose of the FCA, courts have allowed an exception whereby a plaintiff in one of these situations can plead information that may be available only through discovery. *Butler,* 74 F. Supp. 2d at 1215. This does not relieve such a plaintiff from all particularity in pleading. Plaintiff must still "adduce facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard." *Stinson,* 755 F. Supp. at 1052; *Butler,* 74 F. Supp. 2d at 1215. "Bald or conclusory allegations will not suffice." *Stinson,* 755 F. Supp. at 1052; *Cooper,* 19 F.3d at 568.

At the outset, the Court concludes that it should not apply a relaxed pleading standard in this case. Plaintiff made the decision to allege a nationwide fraud scheme extending back as far as 1990. He should not be allowed to evade the command of Rule 9(b) by relying upon the complexity of the edifice which he created. In addition, the facts of the alleged fraud are not peculiarly within the

knowledge of the Defendant. Every alleged false claim is in the possession of others such as the Healthcare Financing Administration. Presumably the government examined those claims during its investigation before it declined intervention in this case. The Court agrees with the Fifth Circuit that "[a] special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process that the statute itself does not contemplate." *Epic Healthcare,* 193 F.3d at 309. For all of the reasons discussed below, the Amended Complaint fails to comply with the particularity requirement of Rule 9(b).

Although there is no question Plaintiff's complaint is detailed regarding the process allegedly undertaken by LabCorp and its employees, it fails to make adequate factual allegations that LabCorp committed fraud against the government. Most notably, Plaintiff alleges no specific facts in support of his general allegation that LabCorp submitted false claims. Instead, Plaintiff makes relatively detailed statements about the alleged schemes carried out by LabCorp, and then ends the description of each scheme with a general summation that typically states "these practices resulted in the submission of false claims for payment to the United States." (Amended Complaint ¶¶ 33, 34, 38, 41, 42, 43, 44, 54, 64, 66, 75, 76, 77). Plaintiff has failed to identify a single claim that was actually submitted pursuant to the allegedly fraudulent schemes identified in the Amended Complaint. Essentially, Plaintiff has set out the process by which Defendants could have produced false claims, but provides no facts that this process did in fact result in the *submission* of false claims. In *United States ex rel. Walsh v. Eastman Kodak Co.,* 98 F. Supp. 2d 141 (D. Mass. 2000), the court reached a similar conclusion where the Plaintiff described with particularity

how defendant vendors had a process that might have produced invoices that falsely inflated the cost of supply items for which hospitals would seek Medicare reimbursement, but failed to identify a single false claim that was actually submitted. Similarly, the court in *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292 (D.D.C. 1996) dismissed plaintiff's complaint because it failed "to state the date or dates on which the allegedly false invoices were submitted, to give the invoice(s) number, [or] to identify the employees responsible for the submission." *Alexander,* 924 F. Supp. at 303; see also, *United States ex rel. Riley v. Alpha Therapeutic Corp.*, 1997 WL 818593 *3 (N.D. Cal. 1997) (holding that plaintiff's amended complaint fails to identify a specific false claim made by any of the defendants named). This information is critical because the FCA only punishes the "knowing" submission of false or fraudulent claims. 31 U.S.C. § 3729(1) and (2); *Alexander,* 924 F. Supp. at 303; *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1265-66 (9th Cir. 1996) (holding that the "FCA offense is the *knowing* presentation of a claim that is either fraudulent or simply false.") (emphasis added). Innocent mistakes and negligence are not actionable under the FCA. *Hindo v. University of Health Sciences,* 65 F.3d 608, 613 (7th Cir. 1995).

Plaintiff claims that his complaint sufficiently sets out the factual basis of the fraud perpetrated by Defendant. Plaintiff argues that the decision in *United States ex rel. Johnson v. Shell Oil Co.,* 183 F.R.D. 204 (S.D. Tex. 1998) should be applied in the present case. Of course, another district court decision is not binding on this Court. In *Johnson,* the court held that the plaintiffs had complied with a relaxed Rule 9(b) pleading standard by alleging

that defendant oil companies had understated actual gross proceeds on the monthly MMS 2014 form that oil lessees like the defendants were required to submit to the government. *Id.* at 207. Specifically, plaintiffs alleged that the misrepresentations occurred at items 16 and 18 on the monthly form. *Id.* at 207. Plaintiff in the present action urges the Court to adopt a similar holding in this case where allegations of Defendant's fraudulent conduct were allegedly recorded and submitted on the HCFA form 1500 that Defendant must use to submit claims for reimbursement. This case, however, is distinguishable because the plaintiffs in *Johnson* identified a report that was submitted each and every month from 1988 to the present, and even pointed out the items on the form that contained the alleged misrepresentation. *Id.* at 207. Defendants in *Johnson* knew exactly what reports were the subject of the suit and could subsequently form an adequate response to the plaintiffs' claims. Although Plaintiff in the present case states that the false claims were submitted on a certain form, he can not identify any actual claim, nor item on the claim, that was submitted by Defendant in violation of the FCA.

Plaintiff also fails to specify the time of submission with particularity. Plaintiff claims that the alleged fraud took place over a period from the late 1980s to the late 1990s (Amended Complaint, ¶ 56-60, 72). Although the Plaintiff states specific dates that duplicative or unnecessary tests were administered, he provides no dates that the allegedly false claims were submitted. The court in *Butler* similarly concluded that allegations of fraud that occurred over the better part of a decade, without any references to a specific point in time, were insufficient to withstand a Rule 9(b) challenge. *Butler,* 74 F. Supp. 2d at

1216. One purpose behind Rule 9(b) is to allow defendants to frame a response to an allegation of fraud. It is hard to imagine how Defendant can respond to an allegation that fraud was committed over a ten year period. Plaintiff must plead more specifically regarding the time that at least some of the fraudulent claims were submitted so that Defendant may adequately respond to the allegations.

In essence, the Amended Complaint does not identify any specific claims that were submitted to the United States or identify the dates on which those claims were presented to the government. Instead, Plaintiff relies exclusively on conclusory allegations of fraudulent billing. Although Plaintiff's description of the fraudulent schemes in which Defendant allegedly engaged is set out in specific detail, performing these tests is not a violation of the FCA. Defendant could perform as many tests as it pleased as long as it only billed for the ones allowable under the applicable governmental program. Therefore, the fact that Defendant engaged in fraudulent testing, without sufficient allegations regarding the billing for these tests, does not allege a fraud claim with sufficient particularity according to Rule 9(b). See *Hopper,* 91 F.3d at 1266 (holding that "the Act attaches liability, not to the underlying fraudulent activity, but to the 'claim for payment' ") (quoting *U.S. v. Rivera,* 55 F.3d 703, 709 (1st Cir. 1995)).

The Plaintiff wants a ticket to the discovery process. If given such a ticket, the next stage of this litigation is clear. The Plaintiff will request production of every lab test claim submitted by the Defendant over the last ten years. At that point, the Defendant may decide to settle the case to avoid the enormous cost of such discovery and the possible disruption of its ongoing business. On the other hand, the Defendant may choose to resist the discovery. In

that case, the Court will be presented with the dilemma of allowing an unlimited fishing expedition or no discovery at all because of the difficulty in fashioning logical and principled limits on what has to be produced. The particularity requirement of Rule 9(b), if enforced, will not only protect defendants against strike suits, but will result in claims with discernable boundaries and manageable discovery limits.

The Defendant's Motion to Dismiss should be granted.[2] Nevertheless, the Eleventh Circuit has held that a plaintiff has the right to amend a complaint at least once to eliminate any deficiencies found by the court. *Cooper,* 19 F.3d at 568; *Butler,* 74 F. Supp. 2d at 1217. The Federal Rules of Civil Procedure provide that leave to amend the complaint shall be freely given as "justice so requires." Fed.R.Civ.P. 15(a). As such, and even though this is an amended complaint, Plaintiff is granted leave to amend his complaint and bring it into compliance with Rule 9(b). *Cooper,* 19 F.3d at 568-69; *Butler,* 74 F. Supp. 2d at 1217. An amended complaint must be filed within 30 days of the docketing of this Order. If no amended complaint is filed, the Clerk is directed to enter judgment for the Defendant and close this file.

---

[2] It is unnecessary to rule on the Defendant's Rule 12(b)(6) Motion to Dismiss Count II for failing to state a claim under the FCA. The issue will be addressed if Plaintiff files an amended complaint that complies with Rule 9(b).

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss [Doc. 36] is GRANTED.

SO ORDERED, this 29th day of November, 2000.

THOMAS W. THRASH, JR.

United States District Judge

IN THE UNTIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA and JEFFREY SCOTT CLAUSEN Plaintiffs, v. LABORATORY CORPORATION OF AMERICA, INC., Defendant.	CIVIL ACTION FILE NO. 1:97-CV-2200-TWT

ORDER

(Filed May 16, 2001)

This is a qui tam action. It is before the Court on the Defendant's Motion to Dismiss Second Amended Complaint [Doc. 48]. The Court previously granted the Defendant's Motion to Dismiss [Doc. 36] the Amended Complaint and granted leave to refile. The Second Amended Complaint suffers from the same defect as the Amended Complaint. Plaintiff Relator contends that the Defendant defrauded the taxpayers of millions of dollars by the submission of false claims for reimbursement for laboratory services. He has not, however, identified a single fraudulent claim by date filed, amount or claim number that was actually submitted to the government. Identifying the type of claim form used and stating that a claim was filed on the day of service or a few days thereafter is not sufficient to identify the fraudulent claims with sufficient particularity to comply with Rule 9(b) in the context of this case. Performing unnecessary tests is not a violation of the False Claims Act. The

particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single false claim by amount. "In this case, [Plaintiff] has merely described the allegedly illegal contracts and arrangements without identifying any person, place or time when an actual false claim or other illegal activity occurred. He alleges at best the existence of a general scheme or methodology by which defendants could have violated the False Claims Act. That is simply insufficient under Rule 9(b)." *U.S. ex rel. Schwartz v. Coastal Healthcare Group, Inc.*, 232 F.3d 902 (Table) 2000 WL 1595976 (10th Cir. 2000). The Defendant's Motion to Dismiss Second Amended Complaint [Doc. 48] is GRANTED. This action is dismissed with prejudice.

SO ORDERED, this 16 day of May, 2001.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 02-534

In The

Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review whether Rule 9(b) applies to claims for which proof of fraudulent intent is not required when that question is not presented on the facts of this case?

2. Should the Court grant certiorari to review whether Rule 9(b) applies to cases brought under the False Claims Act, where, consistent with this Court's recognition that the False Claims Act is an "anti-fraud" statute, Rule 9(b) has routinely been applied by every circuit to decide the question?

RULE 29.6 STATEMENT

Respondent Laboratory Corporation of America ("LabCorp") is a wholly-owned subsidiary of Laboratory Corporation of America Holdings ("LabCorp Holdings"), a publicly held corporation. LabCorp Holdings has no parent corporation, and no publicly held company owns 10% or more of LabCorp Holdings' stock.

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BRIEF IN OPPOSITION

Respondent, Laboratory Corporation of America ("LabCorp"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Petitioner requests this Court to grant certiorari to review an unremarkable decision of the Eleventh Circuit in this case which, consistent with what petitioner acknowledges is the "national trend of courts of appeals' decisions," Pet. 5, held that Federal Rule 9(b) applies to a claim brought under the False Claims Act, 31 U.S.C. §§ 3729-3733. The petition should be denied because this case does not fairly raise the questions presented and because the Eleventh Circuit's decision is decidedly not in conflict (and is in fact consistent) with the decisions of other courts of appeals and does not otherwise present any compelling basis for this Court's review.

In his second amended complaint, petitioner alleged that LabCorp had engaged in a series of nationwide schemes to submit false claims to the United States government. Given the nature of these claims as petitioner framed them, the Eleventh Circuit conducted a routine examination under Rule 9(b) and affirmed the district court's dismissal of petitioner's second amended complaint. This was entirely correct because petitioner was unable to allege even a single specific instance of the submission of a false claim to the United States government.

First and foremost, this case does not, on its facts, present an appropriate vehicle for the broader review that petitioner seeks – that Rule 9(b)'s particularity requirements should be relaxed or not applied at all because the False Claims Act does not require proof of a specific intent to defraud. That issue simply is not presented in this case, where the petitioner's claims relied upon allegations of a purposeful scheme to defraud the United States government. *See* Pet. App. 3 ("In his complaint, Clausen alleges that LabCorp engaged in a multi-faceted, decade-long campaign to defraud the Government as a result of its testing services[.]").

Moreover, in affirming the District Court's dismissal of the second amended complaint, the Eleventh Circuit has not plowed any new ground. To the contrary, and as petitioner acknowledges, the Eleventh Circuit's decision is absolutely consistent with the trend among the circuits; indeed, no fewer than six circuits now similarly apply Rule 9(b) in precisely the same circumstances. As a result, the Eleventh Circuit has not decided an "important question of federal law" in a way that "conflicts with relevant decisions of this Court" or of the courts of appeal. *See* S. Ct. Rule 10. Instead, as its opinion demonstrates, the Eleventh Circuit carefully considered decisions of its sister circuits, this Court's own recognition that the False Claims Act is, at bottom, an "anti-fraud" statute, and the nature of the particular allegations made in the underlying complaints in this case.

For each of these reasons, the petition should be denied.

COUNTERSTATEMENT

A. Rule 9(b) and the False Claims Act.

The requirements of Rule 9(b) are straightforward, and their application to *qui tam* complaints, like the one in this case, is now routine. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The rule is generally understood to require a plaintiff to allege the "who, what, when, where, and how" of the alleged fraud. *See, e.g., Cooper v. Blue Cross & Blue Shield of Fla.,* 19 F.3d 562, 568 (11th Cir. 1994) (per curiam).

In his second amended complaint, petitioner alleged that LabCorp concocted a pervasive scheme to submit false claims to the government, in violation of sections 3729(a)(1) and (1)(2) of the False Claims Act. Those provisions apply to any person who: "(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government *** a false or fraudulent claim for payment or approval; [or] (2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government." 31 U.S.C. § 3729(a)(1)-(2).

The applicability of Rule 9(b) in the context of *qui tam* complaints is well settled. In addition to the Eleventh Circuit, at least five other circuits have held that the rule applies in such circumstances. *See, e.g., Bly-Magee v. California,* 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham*

Clinical Labs, Inc., 149 F.3d 227, 234 (3rd Cir. 1998); and *United States ex rel. Schwedt v. Planning Research Group*, 59 F.3d 196 (D.C. Cir. 1995). *See also Cooper, supra*, 19 F.3d at 568. *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions* § 5.04 (2d ed. 2000 & Supp. 2002) (compiling cases).

B. Factual Background.

LabCorp is a clinical laboratory that offers a broad range of laboratory tests used by the medical profession in the diagnosis, monitoring, and treatment of diseases and other clinical conditions. Through a nationwide network of laboratories, LabCorp has processed literally tens of millions of tests at the request of treating physicians over the last decade, the approximate time period of petitioner's complaint.

Petitioner Jeffrey Scott Clausen, a former employee of SmithKline Beecham Clinical Laboratories, a LabCorp competitor, filed his original *qui tam* complaint under seal in this action on July 28, 1997. That initial complaint alleged that LabCorp violated the federal False Claims Act by submitting false claims for payment to, *inter alia*, Medicare, Medicaid, and the Civilian Health and Medical Program of the United States ("CHAMPUS"). After two years of investigation, the United States declined to intervene in the action. Thereafter, by Order dated January 21, 2000, the District Court unsealed the complaint.

Petitioner filed his first amended complaint on May 10, 2000. LabCorp moved to dismiss the first amended complaint pursuant to Rule 9(b) because Clausen failed to provide any detail or substantiation for his claims of fraud

under the FCA. The District Court granted LabCorp's motion to dismiss while granting Clausen leave to amend. On December 29, 2000, Petitioner filed a second amended complaint. Because the second amended complaint did nothing but *assume* that false claims must have been filed within several days of testing, LabCorp again moved to dismiss under Rule 9(b). LabCorp argued that the second amended complaint was deficient because Clausen did nothing more than repeat his broad allegations of fraud with the single addition of alleging, upon information and belief, that LabCorp submitted false claims to the government sometime "on or within a few days following" the alleged dates of service. Like the preceding first amended complaint, the second amended complaint did not identify a single specific claim that had been submitted to the United States or explain how any such claims were false, let alone identify the dates on which these "false claims" were supposedly presented to the government, or by whom.

On May 16, 2001, the District Court dismissed the second amended complaint, this time with prejudice, for failing once again to comply with Rule 9(b):

> [Clausen] has not . . . identified a single fraudulent claim by date filed, amount or claim number that was actually submitted to the government. Identifying the type of claim form used and stating that a claim was filed on the day of service or a few days thereafter is not sufficient to identify the fraudulent claims with sufficient particularity to comply with Rule 9(b) in the context of this case. Performing unnecessary tests is not a violation of the False Claims Act. The particularity requirement of Rule 9 is a nullity if Plaintiff gets

> a ticket to the discovery process without identifying a single false claim by amount. "In this case, [Clausen] has merely described the allegedly illegal contracts and arrangements without identifying any person, place or time when an actual false claim or other illegal activity occurred. He alleges at best the existence of a general scheme or methodology by which defendants could have violated the False Claims Act. This is simply insufficient under Rule 9(b)."

Petitioner's appeal to the Eleventh Circuit followed.

In a careful and comprehensive opinion, a divided panel of the Eleventh Circuit affirmed the District Court. Pet. App. 1-36. The Court of Appeals first rejected Clausen's argument that Rule 9(b) should not be applied in the context of a *qui tam* complaint, agreeing with the decisions of its sister circuits and a number of district courts, as well as with a prior decision in the Eleventh Circuit, in which Rule 9(b) had expressly been held to apply to False Claims Act cases. *Id.* 14-18. While Judge Barkett, in dissent, disagreed with the outcome, she did not disagree with the majority's application of Rule 9(b) to the facts of the case. *See* Pet. App. 30-36.

The Court of Appeals measured Clausen's second amended complaint against Rule 9(b)'s standard, and reached the conclusion that, based upon its review of the pleadings, Clausen's amended allegations came up short. Pet. App. 19-29. The Court of Appeals conceded that while Clausen may have alleged a fraudulent scheme with sufficient particularity, he had failed to provide any information regarding the submission of any *actual* – and not merely theoretically possible – false claims to the government:

> Without the *presentment* of such a claim, while the practices of an entity that provides services to the Government may be unwise or improper, there is simply no actionable damage to the public fisc as required under the False Claims Act. *Harrison,* 176 F.3d at 785 ("The False Claims Act at least requires the presence of a claim – a call upon the government fisc – for liability to attach."). The submission of a claim is thus not, as Clausen argued, a "ministerial act," but the sine qua non of a False Claims Act violation.

Id. 22 (emphasis added).

Clausen petitioned for rehearing and rehearing en banc of the Eleventh Circuit's decision. The Court of Appeals denied the petition without dissent. *Id.* 37-38.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY THE PETITION IS NOT FAIRLY RAISED BY THIS CASE.

This case does not present an appropriate vehicle for considering the applicability of Rule 9(b) generally to *qui tam* complaints brought under the False Claims Act because that question was simply not an issue in this case. The second amended complaint filed by Clausen, like each of its prior iterations, plainly sounded in fraud. Clausen broadly alleged a decade-long "scheme" by LabCorp, through a variety of methods including self-referrals, duplicative testing, excess charges and illegal kickbacks, to "submit false claims to the United States . . . on a nationwide basis." Second Amended Compl. ¶¶11, 25. Clausen further alleged, in connection with each of these

alleged "schemes," that "claims for payment for the *fraudulently billed* procedures were submitted electronically on the dates of services . . . or within a few days thereafter." *Id.*, ¶45-47 (emphasis added.)

Clausen's complaint is thus not the stuff of negligence, but is instead based upon allegations of intentional fraudulent misconduct. As a result, whatever the broader policy considerations advanced by Clausen in support of his petition, the Court should not grant certiorari here, where those policies could not conceivably have come into play. *See, e.g., Rogers v. United States,* 522 U.S. 252, 259 (1998) (dismissing writ of certiorari as improvidently granted where "the record does not fairly present the question that we granted certiorari to address.").

At most, petitioner challenges the Eleventh Circuit's otherwise routine application of Rule 9(b) to the allegations of fraud set forth in his second amended complaint. Far from presenting any compelling basis warranting review in this Court, an asserted misapplication of the rule to the facts of this case is not an appropriate basis for certiorari. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court should decline to review the question presented by this petition until, if at all, it is presented in a case in which it was fully and properly considered below.

II. THE COURT SHOULD DECLINE TO GRANT REVIEW OF THIS CASE BECAUSE THIS CASE PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT OR WITH THE DECISION OF ANY OTHER CIRCUIT COURT.

The Eleventh Circuit applied the correct standard in assessing Clausen's claims under Rule 9(b). Its decision to apply 9(b) in the context of a False Claims Act case was consistent not only with established precedent in its own court, *see Cooper, supra,* 19 F.3d at 568, but also with the decisions of no fewer than five other circuit courts of appeal. *See Bly-Magee v. California,* 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs, Inc.,* 149 F.3d 227, 234 (3rd Cir. 1998); and *United States ex rel. Schwedt v. Planning Research Group,* 59 F.3d 196 (D.C. Cir. 1995). *See also Cooper v. Blue Cross & Blue Shield of Fla.,* 19 F.3d 562, 568 (11th Cir. 1994) (per curiam).

Faced with such consistent application of Rule 9(b) principles, petitioner tries to gin up a review-worthy controversy by claiming that the various circuit court decisions over the past decade bring those courts into conflict with decisions of this Court. Pet. 5, 18-19. Contrary to Clausen's assertions, the Eleventh Circuit's decision in this case and the decisions of its various sister courts to apply Rule 9(b) in False Claims Act cases do not constitute an improper expansion of 9(b) contrary to Congress' intent or the decisions of this Court.

The two cases cited by petitioner for this proposition – *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence and*

Coordination Unit, 507 U.S. 163 (1993) – lend no support to the petition. In *Leatherman,* the Court was faced with the question of whether a federal court could apply a "heightened pleading standard" in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. The Court held that it could not:

> Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983.

507 U.S. at 168. *Swierkiewicz* applied a similar rationale to reach the same conclusion in the context of Title VII. *Swierkiewicz,* 534 U.S. at 512 ("Just as Rule 9(b) makes no mention of municipal liability under [42 U.S.C. § 1983], neither does it refer to employment discrimination.").

Unlike Section 1983 and employment discrimination, Rule 9(b) does expressly contemplate application to the type of activity that is at the core of the False Claims Act – fraud. As this Court has itself recognized – both prior to and following Congress' overhaul of the False Claims Act in 1986 – the False Claims Act is an "anti-fraud" statute. *See, e.g., Vt. Agency of Natural Res. v. Stevens,* 529 U.S. 765, 781 (2000); *United States v. Neifert-White Co.,* 390 U.S. 228 (1968). As a result, Rule 9(b), by its terms, applies to claims brought under the statute.

The 1986 amendments to the False Claims Act do not alter this conclusion. The False Claims Act, as amended,

plainly continues to address complex schemes to defraud the government – as Clausen attempted to allege below and as to which Rule 9(b) unquestionably applies – in addition to false claims submitted in reckless disregard of the truth or falsity of the submission. More to the point, given petitioner's reliance on the absence of any requirement to prove specific intent to defraud under the amended act, Rule 9(b) by its terms applies to "all averments of fraud *or* mistake." Fed. R. Civ. P. 9(b) (emphasis added). Thus, even if petitioner's underlying claims had not asserted an intentional scheme (which they did), even unintentional errors in submissions (albeit arguably inadequate to establish liability under the False Claims Act) must be pled with particularity.

Nor is application of Rule 9(b)'s particularity requirements inconsistent with expressed Congressional intent. The 1986 amendments to the False Claims Act were intended to encourage relators with actual knowledge of fraud or false claims against the government to come forward without fear of retaliation. ("The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward.") S. Rep. No. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. It did so through a number of new measures, among them enactment of specific provisions to protect relators against possible retaliation. *Id.* at 2, 34, *reprinted in* 1986 U.S.C.C.A.N. 5267, 5299.

The amendments also broadened the definition of "knowing" conduct to address the submissions of both false and fraudulent claims and to capture not only purposeful fraud, as Clausen alleged, but also "ostrich-like" conduct

by corporate managers who might otherwise undertake no effort to determine the accuracy of the claims submitted. *See, e.g.*, S. Rep. 99-345, at 7, 14, *reprinted in* 1986 U.S.C.C.A.N. 5272, 5279. There is nothing in the legislative history, however, that supports the notion that Congress intended to lower the bar to such an extent as to permit, let alone encourage, corporate outsiders like the petitioner here to use their general knowledge of an industry to craft a complaint based on pure speculation, in the hopes that, through discovery, something might turn up.

Rule 9(b) continues to strike a necessary balance between Congress' desire to encourage relators having actual knowledge of false or fraudulent conduct to come forward and the recognized need to provide continuing protection to defendants against strike suits and otherwise frivolous claims. Recognition of this need in the context of False Claims Act litigation has been a consistent thread in the decisions of the various courts of appeal, and is not in any way at odds with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF

In opposition, LabCorp mistakenly celebrates the fact that there is a national trend of courts applying Rule 9(b) to False Claims Act ("FCA") cases, stating that six circuits (and district courts as well) have expressly applied Rule 9(b) to FCA cases. Opp. 2, 6. LabCorp states that the application of Rule 9(b) is now "routine". *Id.* at 3. However, when the national trend and the routine are legally wrong and undermine the plain meaning of the Rules and the statutory language and intent of Congress, it is precisely then that the Court should grant certiorari. *See* Pet. at 18-24. Indeed, it seems that one ruling with broad national impact, which would correct at least six erroneous decisions, is more worthwhile than a decision that concerns only two opinions that happen to be in conflict.

Moreover, LabCorp's response completely overlooks (and leaves uncontested) four main points for granting certiorari:

1. The *Clausen* decision admittedly "'makes it hard for many persons to bring a *qui tam* suit'" in direct contravention of Congress' purpose in enacting the 1986 amendments. App. at 15 (quoting *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *see* discussion in Pet. at 6-10; *see also* Opp. at 11 (the purpose of the amendments was to encourage potential whistleblowers to come forward). In enacting the 1986 amendments, Congress sought to free the FCA from the shackles of restrictive court interpretations, which kept potential whistleblowers from coming forward. S. Rep. No. 99-345, 99th Cong., 2d Sess. 1, 4, reprinted in 1986 U.S.C.C.A.N. 5266, 5269 (hereinafter "S. Rep."). Because the *Clausen* decision restricts the FCA and sends potential whistleblowers back to the shadows of silence, it is worthy of this Court's attention and correction. Pet. at 6-10. The FCA is a national law of national importance. *Id.* at 7. Unfettered, taxpayers have reaped benefits by recuperating billions of dollars of misused taxpayer monies. *Id.*; *see also The 1986*

False Claims Act Amendments: An Assessment of Economic Impact, 7 FALSE CLAIMS ACT AND QUI TAM QUARTERLY REVIEW 28 (1996) (hereinafter "FCA QUARTERLY REVIEW") (deterrent effect estimated at $300 billion for first 10 years). Refettered, taxpayers stand to lose tens or hundreds of billions of dollars a year. S. Rep. at 3.

The potentially devastating impact of the *Clausen* decision can be shown by retroactively applying it to FCA complaints resulting in historically large settlements. *Clausen* would likely have wiped out most of the largest settlements on record as "frivolous" for failing to plead all the elements with exactness. *See* Pet. at 11-15. For example, the largest settlement to date involved Columbia/HCA and the payment of $745 million. Trisha Renaud, *Medicare Fraud Tipster to Get $25 Million*, FULTON COUNTY DAILY REPORT, Feb. 22, 2001, at 1. There were over 30 cases filed against Columbia/HCA that were consolidated in multidistrict litigation. *Id.* Not one of the 30 relator complaints would have passed *Clausen*'s heightened pleading standard. Not one includes the exact date, amount, invoice number, or specific employee who submitted the bill ("the sine qua non of an FCA violation").[1] App. at 22; *see id.* at 24 (requiring statements, "with particularity, [of a] false claim actually being submitted to the government"). Indeed, not one complaint was pled with anywhere near the amount of detail provided in the complaint in this case. *See* Pet. at 3-4, 15.

A case filed against Chevron, BP Amoco, Texaco and others resulted in some of the largest settlements in 2000. *Top Qui Tam Recoveries for the Year 2000,* 21 FCA QUARTERLY REVIEW 20-21 (2001) (over $170 million combined). However, the complaint would not have passed the

[1] Petitioner's counsel are also counsel in three Columbia/HCA cases and have been provided all complaints as part of the MDL process.

Clausen standard. *See U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206-07 (E.D. Tx. 1998) ("The defendants' pleas of the need for specific dates and invoice numbers for each transaction are not persuasive."). In 1997, SmithKline Beecham had the largest FCA settlement. 9 FCA QUARTERLY REVIEW 30 (1997) ($325 million). The complaint in that case could not have passed the *Clausen* standard.[2] *See e.g., U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Lab.*, 149 F.3d 227, 235-36 (3d Cir. 1998) (quoting portions of the complaints alleging only that defendant "'*routinely billed* government health insurance programs for unordered blood tests . . . '" and "'[by] expanding and manipulating its test profiles, performing tests that are not medically necessary, and improperly billing for tests that should have been part of an automated test profile, [SmithKline] has *knowingly presented numerous false and fraudulent claims* for payment by the government.'" (emphasis added)). In 1996, LabCorp, itself, settled a case for $182 million – one of the largest at the time. *Top 1996 Qui Tam Recoveries*, 8 FCA QUARTERLY REVIEW 42 (1996). However, the complaint in that case could not have passed the *Clausen* standard.

Not only will *Clausen* push potential whistleblowers back to the shadows of silence, but it provides a nearly foolproof blueprint to defendants on how to reduce their potential exposure to prosecution. They simply need to make sure that no single employee has access to all the information required in *Clausen*, or that all suspicious employees are terminated before they can obtain such information. *See* Pet. at 8-10.

2. *Clausen*'s new Rule 9(b) is used to determine the merits of cases at the pleading stage rather than focus on

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[2] Petitioner Clausen was a party to the lawsuit and has access to the complaints. Petitioner's review is supported by pleading examples found in the Third Circuit's opinion.

notice pleading, thus wholly swallowing Rule 8 in contravention of the intent of the Rules and this Court's long-standing precedents. *See* discussion in Pet. at 10-17. The new Rule 9(b) is not restricted to whistleblowers or even FCA cases. Any plaintiff, including the Department of Justice, must abide by the new *Clausen* version of Rule 9(b) – requiring the particularized pleading of every element of a claim under the FCA or any other cause of action to which courts choose to apply Rule 9(b). The new Rule 9(b) requires an exactness in pleading not seen since the field code, creating a pleading minefield where one misstep results in dismissal with prejudice. *See* Pet. at 14-17 & n.4. This pleading "game of skill" was precisely what the Rules were intended to avoid, as was declared by this Court in *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). *See also* Pet. at 7-8, 12-13.

The new draconian version of Rule 9(b) not only eviscerates a very important national law (the FCA), but it will affect a veritable cornucopia of cases nationwide. The case of the billing clerk in Northern Alabama who was instructed how to defraud the government and watched fraudulent Medicare billing firsthand, but who was fired before copying any billing documents, would be dismissed as frivolous. The farmer from Southern Georgia who pleads that "on or about" a specific date, he paid a man he met at a bar for an investment in a company that did not exist will find his case summarily dismissed as meritless. The retiree from Southern Florida who was victimized by a RICO enterprise, but who is unable to ascertain, pre-discovery, all the particular details of each of the predicate acts will expeditiously lose with prejudice. Only a ruling by this Court can contain the potentially disastrous and widespread effects of the application of *Clausen*'s new Rule 9(b).

3. Requiring the pleading of evidence and refusing to accept the allegations as true undermines bedrock principles of the Rules and this Court's clear instructions. Pet. at 25-28. For the same reasons this Court granted certiorari

in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), and *Conley v. Gibson*, *supra*, it should grant this petition. This Court should protect the Rules and this Court's prior rulings from erosion and disregard.[3]

Allowing courts to use "heightened pleading" requirements to circumvent the edict that they must take the allegations as true will particularly affect the False Claims Act. In liberalizing the act in 1986, Congress expressly recognized that potential whistleblowers are very reluctant to come forward. S. Rep. at 4. A study reviewed by Congress showed that 69% of "those who believed they had direct knowledge of illegalities failed to report the information." *Id.* The number one reason given for failing to report fraud, waste and abuse was "the belief that nothing would be done to correct the activity even if reported." *Id.* at 5. It appears that Congress saw restrictive interpretations of the FCA, such as heightened proof requirements, as a reason for the belief that nothing would be done. *See id.* at 4. Allowing a judge to make a determination that, although a complaint provides sufficient

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[3] *Swierkiewicz* was unambiguous in requiring courts to avoid creating or expanding "heightened pleading" standards. *Swierkiewicz, supra*, at 514-15; *see also Leatherman, supra*, at 168. It appropriately instructed courts that claims lacking merit are to be dealt with on summary judgment and not at the pleading stage. *Swierkiewicz, supra* at 514; *see also Leatherman, supra*, at 168. In that *Clausen* and *Swierkiewicz* were decided in the same year, but *Clausen* completely failed to distinguish or even mention *Swierkiewicz* (or *Leatherman*), it appears that within only a few months, this Court's precedents were already being eroded. Because this Court meant for *Swierkiewicz* and *Leatherman* to be followed, it should grant the petition, vacate the *Clausen* decision and remand for an order consistent with this Court's precedents.

specificity to put defendant on notice, it is not sufficiently specific to be "believable", will prevent vast numbers of whistleblowers from coming forward and completely undermine the 1986 amendments and the FCA itself. If *Clausen* is not overturned, whistleblowers across the nation will go silent.

4. Potential whistleblowers, and others, will also be deterred by the one amendment rule. *See* Pet. at 28-30. Indeed, this "'one chance to amend'" policy is irreconcilable with the plain meaning of Rule 15 and this Court's longstanding precedent in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). App. at 16 (quoting *Cooper, supra*, at 568-69).

Ignoring all other reasons for granting the petition, LabCorp's opposition is solely focused on the application of Rule 9(b) to FCA cases. First, as noted above, LabCorp argues that the Court should only take cases where there is a split of authority. Opp. at 2, 6. Second, LabCorp argues that the issue was not "fully and properly considered below." *Id.* at 8. Finally, LabCorp argues that Rule 9(b) should apply to all FCA cases because the FCA is an anti-fraud statute. *Id.* at 10.

LabCorp's argument that this Court should only grant petitions concerning splits of authority is addressed above. Moreover, it may actually support the petition if one takes into account the many "splits of authority" caused by *Clausen*'s new Rule 9(b) requirements, refusal to relax the new requirements, refusal to accept the facts as true, determination of the merits at the pleading stage, and refusal to allow amendments. *See* Pet. at 10-17, 25-30; *see also Ables v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001) (Rule 9 must not abrogate Rule 8); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988) (same); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1050-51 (7th Cir. 1998) (cited by *Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) as an example of relaxing Rule 9(b)); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir.

1987) (same); *Club Protector Inc. v. J.G. Peta, Inc.*, 2002 U.S. App. Lexis 23385, slip op. at 3 (Fed. Cir. Nov. 8, 2002) ("We must accept as true all of the factual allegations in the complaint, make inferences from those allegations in the light most favorable to the plaintiffs, and liberally construe the complaint."); *Maple Lanes, Inc. v. Messer*, 186 F.3d 823, 824-25 (7th Cir. 1999) (same), *cert. denied,* 528 U.S. 1118 (2000); *White v. Walsh*, 649 F.2d 560, 562 (8th Cir. 1981) (courts do not review merits of case on motions to dismiss); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 998-99 (2002) ("Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56."); *Gulig v. Comm'r*, 293 F.3d 279, 281 (5th Cir. 2002) (leave to amend to be freely given); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (same).

LabCorp also argues that the Second Amended Complaint ("SAC") is "based upon allegations of intentional fraudulent misconduct" which would trigger an application of Rule 9(b) regardless of whether an FCA case for "negligence" might otherwise avoid it. Opp. at 7-8. In reality, the allegations of the SAC are co-extensive with the definition of "knowing" in the FCA, making it a perfect case for review. "*All of the conduct* alleged in the Amended Complaint is alleged to have occurred 'knowingly' as that term is defined in the [FCA], 31 U.S.C. § 3729(b)." SAC ¶ 19 (emphasis added).[4]

LabCorp argues that this is not a good case for review because the issue was not "fully and properly considered

[4] Although defendant notes that three paragraphs of the SAC use the phrase "fraudulently billed", the remainder (and vast majority) of similar references simply state that claims were submitted, billed or falsely submitted. *See e.g.*, SAC ¶¶ 52-62. Thus, consistent with the allegations of the SAC, petitioner could prevail without proving actual fraud. *See* SAC ¶¶ 72-75 (cause of action defined as "knowing" submission of false claims).

below." Opp. at 8. However, the direct opposite is true. App. at 15-18. The *Clausen* decision is actually the rare case that directly acknowledges that an FCA claim may be predicated on reckless disregard or deliberate ignorance, and yet applies Rule 9(b) to all FCA cases regardless of how they are pled. *Id.* Indeed, while other courts have applied Rule 9(b) without analysis or discussion, this case provides a particularly good vehicle for review principally because the issue was thoroughly discussed. *Compare LaCorte, supra*, at 234 (no analysis) *with* App. at 15-18.

In addition, as is clear from *Swierkiewicz* and *Leatherman*, the question of whether to apply Rule 9(b) to a statutory cause of action not expressly mentioned in Rule 9(b) can be determined through statutory interpretation irrespective of how the complaint is pled. *See Swierkiewicz, supra*, at 513; *Leatherman, supra*, at 168. Moreover, the Court in *Swierkiewicz* instructed that what is initially pled is not as important to a review as what could be proven after discovery. *Id.* at 511-12 ("Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard. . . . "). In other words, if discovery may allow a more lenient standard of proof, that is what should be used on review. *Id.* Here, discovery is not even necessary, because regardless of how an FCA complaint is drafted, the FCA does not require proof of fraud. *See* 31 U.S.C. § 3729(b); Pet. at 20-24. "It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits. . . . " *Swierkiewicz, supra*, at 511-12.

In the end, LabCorp adds nothing to *Clausen*'s analysis on applying Rule 9(b) to all FCA cases. *See* Opp. at 9-12; *but see* Pet. at 18-24 (addressing *Clausen*). However, LabCorp's argument highlights *Clausen*'s divergence from

this Court's analysis in *Swierkiewicz*. In essence, *Clausen* presumed that simply because one *could* plead fraud in support of an FCA case, Rule 9(b) should apply to all FCA cases. App. at 16-17. However, in *Swierkiewicz*, this Court assumed the opposite. Although a higher standard of proof was potentially applicable to the discrimination case before the Court, it analyzed the application of a heightened pleading standard based on the lesser proof that could have been available post-discovery. *Swierkiewicz, supra*, at 511-12. The lesser proof acknowledged by *Clausen* and LabCorp does not involve fraud. *See* Opp. at 11; App. at 17 n.15. Therefore, to apply Rule 9(b) to a cause of action that *expressly* does not require proof of fraud is to expand Rule 9(b) beyond what the unanimous Court in *Swierkiewicz* and *Leatherman* would allow.

Clausen indicates that Rule 9(b) should apply because Congress targeted fraud, making the FCA an "anti-fraud" statute. App. at 17; Opp. at 10-11. Rule 9(b) does not apply to statutes that target fraud or anti-fraud statutes. Rather it applies to averments of fraud. Pet. at 1. Congress may well have wanted to recuperate money lost due to fraud. However, Congress drafted a statute that did not require the pleading or proof of fraud. Pet. at 20-24.

Congress amended the FCA in 1986 to avoid restrictive court interpretations like the one espoused by *Clausen*. S. Rep. at 4. In fact, the legislative history of the amendments specifically differentiates the *design* of making "the Government whole for fraud losses" and the statutory *requirement* only "that the defendant knowingly submitted a false claim." *Id.* at 6-7. Congress then clarified that this had wrongly been construed by courts to require "actual knowledge of fraud" which "prohibits the filing of many civil actions to recover taxpayer funds lost to fraud." *Id.* at 7. In conjunction, Congress also addressed courts' erroneous requirements of heightened proof standards based on analogous criminal fraud statutes. *Id.* Congress changed the FCA to create the gross negligence standard

and to specifically exclude proof of fraud. 31 U.S.C. § 3729(b).

Because Congress took the old law (prior restrictive FCA interpretations) and rectified the mischief (heightened standards of proof) by expressly stating that fraud was not a necessary element of proof under the FCA (the remedy), *Clausen* stands the doctrine of the old law, the mischief and the remedy on its head in applying Rule 9(b) to FCA cases. *See United States v. St. Paul, M. & M. R. Co.*, 247 U.S. 310, 318, 38 S.Ct. 525 (1918).

Respectfully submitted,

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